AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 76.

M. E. SOLIAH, W. H. M. LYCHE, AND J. O. STAUPE, PLAINTIFFS IN ERROR,

vs.

SVEN HESKIN, K. T. PETERSON, AND HANS KRINGLEN, CONSTITUTING THE BOARD OF COUNTY DRAIN COMMISSIONERS IN AND FOR TRAILL COUNTY, NORTH DAKOTA.

IN ERROR TO THE DISTRICT COURT OF TRAILL COUNTY, STATE OF NORTH DAKOTA.

RECORD FILED JUNE 28, 1909.

(21,735.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 25, 1911.

1 In the Supreme Court of the United States.

M. E. SOLIAH et al., Plaintiffs in Error,
vs.
SVEN HESKIN et al., as Members of the Board of Drain Commissioners of Traill County, N. D., Defendants in Error.

The Summons is in unusual form, and was duly served.

Complaint.

The plaintiffs in behalf of themselves and all other persons similarly situated for cause of action allege:

That the defendants, A. G. Cormack, C. L. Gordan and J. F. Johnson, were each of them before the commencement of this action and before the proceedings hereinafter mentioned appointed by the Board of County Commissioners of Traill County, North Dakota, members of the Board of County Drain Commissioners in and for the County of Traill and State of North Dakota, under and by virtue of an act of the legislature, being Chapter 23 of the Political Code of North Dakota, as found in the Revised Codes of 1905; that each of said defendants after being so appointed, qualified in the manner prescribed by said Statute, and ever since have been and now are assuming to act and exercise the authority, which the said Act of the Legislature purports to vest in the Board of Drain Commissioners, in and for Traill County, North Dakota.

That thereafter before the commencement of this action a petition by six or more freeholders owning property affected by the proposed drain, which was thereafter established and hereinafter described as North Mayville Drain Number Eight (8), pre-
2 sented to said Board in the form prescribed by the act of the Legislature above referred to praying for the establishment of the drain hereinafter described and known as North Mayville Drain Number Eight (8).

That thereupon after proceedings had in accordance with the provision of said Act of the Legislature above referred to, said defendants, acting as the Board of County Drain Commissioners in and for Traill County, North Dakota, determined and resolved that said drain so petitioned for should be constructed and thereupon caused the route of said drain to be surveyed and plans and specifications therefor to be prepared in the manner provided by said Act of the Legislature, which said drain was established to begin at a point in Section Twenty-eight (28), Township One Hundred Forty-eight (148), of Range Fifty-two (52), in Traill County, North Dakota, Six Hundred and Seventy-five (675) feet South and Twenty-four (24) feet East of a corner common to Sections Twenty (20), Twenty-one (21), Twenty-eight (28) and Twenty-nine (29) in said township and running thence South and Easterly, as more particularly set forth in a description of said drain found in the records of the said Board of Drain Commissioners, and terminating in a coulee

at the intersection of Sections Twenty-three (23), Twenty-four (24), Twenty-five (25) and Twenty-six (26) in Township One Hundred Forty-seven (147) Range Fifty-two (52). Also a branch or lateral ditch emptying into said main ditch above described, running from a point Seventy-one (71) feet East of the quarter Section corner on the North side of Section Three (3), in Township One Hundred Forty-seven (147) of Range Fifty-two (52), thence in a generally southeasterly direction until it terminates in the main ditch above described. That the estimated cost of said drain as found by the said Board of Drain Commissioners is Fifteen Thousand Eight Hundred Dollars ($15,800).

That thereafter, on to-wit: the 9th day of July, 1907, said defendants assuming to act as such Board of Drain Commis-
3 sioners, under the provision of said law, determined and resolved that the cost of said drain should be paid for by assessments or taxes to be levied in accordance with the provisions of said Act of the Legislature upon numerous tracts of land situated in congressional Townships One Hundred Forty-eight (148), Range Fifty-two (52); Township One Hundred Forty-eight (148), Range Fifty-three (53) and Township One Hundred Forty-seven (147), Range Fifty-two (52), each of which tracts of land were by said Board specifically described and the percentage of the total cost of said drain, which each tract should bear was set down opposite each tract described; that Nine Thousand Five Hundred Forty-four ten thousandths parts of the total cost of said drain was thus apportioned according to what said Board of Drain Commissioners deemed to be benefits to each tract upon said respective tracts of land, and the remainder of the cost of said drain, to-wit: Four Hundred and Fifty-six ten thousandths parts was directed to be paid by Mayville Township and Morgan Township in the following proportions: Three per cent to be paid by Mayville Township and One Hundred Fifty-four ten thousandths parts to be paid by Morgan Township; That said Mayville Township and said Morgan Township respectively, are duly organized and existing civil townships in the County of Traill and State of North Dakota, and include within their respective boundaries most of the tracts of land which said Board of Drain Commissioners resolved and determined to specially assess for the cost of said drain.

That the plaintiff M. E. Soliah is a tax-payer and property owner in the Township of Mayville and is also a property owner and tax-payer in the Township of Morgan; that said M. E. Soliah is also the owner of the South Half of Section Seventeen (17), in Township One Hundred Forty-eight (148) of Range Fifty-two (52) and the Northwest Quarter of Section Thirty (30) in Township One Hundred Forty-eight (148), of Range Fifty-two (52), the same being in Morgan Township. That said Soliah also owns the South
4 Half and the Northwest Quarter of Section Thirteen (13), in Township One Hundred Forty-eight (148), of Range Fifty-three (53) and the East Half of Section Twenty-five (25), in Township One Hundred Forty-eight (148), of Range Fifty-three (53), the same being in Garfield Township, all of which respective

are included among the tracts which said Board of Drain
nissioners have resolved, determined and intend to tax in the
of special assessments for part of the cost of constructing said
sed drain. That the plaintiff, W. H. M. Lyche, is the owner
Northeast Quarter of Section Sixteen (16), in Township One
lred Forty-eight (148), of Range Fifty-two (52), also the
west Quarter of Section Ten (10) and the Northwest Quarter
tion Nine (9) in the same township and range, same being in
n Township, and the said Lyche is a resident tax-payer of
Morgan Township; that said lands so owned by said Lyche are
led in the land, which said Board of Drain Commissioners
resolved, determined and intend to tax in the form of special
ments for part of the cost of the construction of said proposed
. That the plaintiff, J. O. Staupe, is the owner of the North-
Quarter of Section Thirty-one (31), in Township One Hun-
Forty-eight (148), of Range Fifty-two (52), the same being
rgan Township and said Staupe is a resident tax-payer in said
ille Township and said lands so owned by said Staupe are in-
l among the lands the said Board of Drain Commissioners have
ed, determined and intend to tax in the form of special assess-
for part of the cost of the construction of said proposed drain.
at said Board of Drain Commissioners are now advertising for
for the construction of said drain and will, unless restrained
njoined from so doing, enter into contracts for the construc-
hereof and cause the same to be constructed and will, unless
ed and restrained from so doing, impose a charge upon the
lands of these plaintiffs and also upon the civil townships of
Mayville and Morgan, large amounts, in the form of special
assessments or taxes to pay for the construction of said pro-
drain, which said special assessments and taxes so imposed by
Board will be reported to the County Auditor of Traill County
pread upon the tax lists as a charge against the lands of these
iffs and others, and the amount that said Drain Commissioners
apportioned to the townships of Mayville and Morgan will be
by the officers of said respective townships as a part of the
al tax for township purposes upon all the property within said
tive townships and added to the other taxes upon property
n said respective townships.

at none of these plaintiffs have ever petitioned for said drain
have in no manner consented to the construction thereof, but
e contrary have protested and still protest against the same.

intiffs, therefore, in their own behalf and in behalf of all
similarly situated, with respect to the drain hereinbefore de-
d, pray, that said defendants and each of them and said Board
rain Commissioners be forever enjoined and restrained from
er proceeding with the levying of any taxes or assessments, or
the construction of said drain, or the letting of any contracts
he construction thereof, and that all the acts of said Defend-
nd said Board of Drain Commissioners be adjudged and de-
to be null and void; and for such other and further relief
the Court may seem just and equitable.

Demurrer.

The defendants' demur to the Complaint of the plaintiffs in the above entitled action, and for a cause of demurrer allege:

That the said complaint does not state facts sufficient to constitute a cause of action.

6 Wherefore, defendants demand judgment against the plaintiffs for the dismissal of said action and for their costs and disbursements therein.

Order Sustaining Demurrer.

For the health, full enjoyment and general convenience of parties within a certain district, improvements by way of drainage are sought to be made. Those parties appeal to the state for assistance, through a uniform method, in doing what singly it would be impracticable to accomplish.

The Legislature creates a Drainage Board and empowers it to proceed in a certain manner, giving owners of property ample opportunity to be heard, to the end that the rights of all parties interested can be protected and to prevent their property being taken without due process of law.

Counsel for plaintiffs contend that the power to order such local improvement and the consequent rights to tax must be exercised by the legislature itself; or its authority in that respect must be delegated to and exercised by the majority of the electors, inhabitants or property owners of the locality to be taxed, or the local officers or governing authorities which are recognized by the Constitution as the representatives of the local community or taxing districts, and as such the proper recipients of the local taxing power. And that it is entirely unimportant whether the power to levy special assessments for drains is derived in the first instance from the taxing power or is wholly an exercise of the police power, because in either case it is an exercise of the legislative power.

In other words, counsel for plaintiffs attack the constitutionality of the drainage law of this state and contend that the same is void, under the rule announced by our supreme court in the case of Valley vs. Bd. Park Com. Grand Forks, 111 N. W., 615,

7 wherein the doctrine is stated that "The power to tax is a legislative power, and cannot be delegated to boards or commissions whose appointment has not been in some way assented to by the people." The sole issue therefore which has been raised by a demurrer to the complaint in the above action is as to the constitutionality of this law upon the grounds stated.

The court takes judicial notice of its own records and of other matters of such general interest as the Drainage of the Red River Valley. In each of the three counties of the third district there are Drainage Boards, most of which have been in existence since the enactment of the law, engaged in the construction of drains. Large amounts of money have already been and are now being ex-

pended. Bonds have been issued and in many instances owners of land are enjoying the benefits coming from completed drains. In Cass County alone the bonds outstanding amount to $143,011.35, and the obligations for contracts entered into for warrants issued and to be issued amount to $66,000.00.

The act in question has been before the supreme court of this state, and altho the question here involved was not raised, yet upon many other questions, such as whether property was being taken without due process of law, the law was pronounced constitutional. (Erickson vs. Cass Co., 11 N. D., 494.) Upon the faith of that decision large numbers of obligations have been assumed. So serious are the consequences flowing from declaring an act of the legislature unconstitutional, especially an act which has been favorably adjudicated by the courts and long acquiesced in by the people, the rule is universally held that before a court decides a statute is unconstitutional, it must be convinced thereof beyond a reasonable doubt, and, if there might be within any reason and theory or purpose bringing the statute within legislature power, such basis must be assumed for it. State ex rel. Gubbins vs. Anson et al., 112 N. W. R. (Wis.) 475.

8 Is there any such basis in this case? I am clearly of the opinion there is. The case recently decided by our supreme court had to deal with a tax. Here the court is confronted with what is generally known as a special assessment for improvements. Is there any difference between the two? Clearly, no change of name can change the essential nature of the thing, so as to escape constitutional regulation, by a mere play on words or by giving the laying of taxes a different name or designation. Upon the authority of such eminent legal scholars and writers as Judges Dillon and Cooley; of Smith, Judson, Destry and Elliott, I find there is a clear distinction.

In Elliott on Roads and Streets, Second Ex., Sec. 543, it is said "A distinction is made between local assessments and taxes levied for general revenue purposes. The question has been before the courts time and time again, and the almost unruffled current of judicial opinion is that an assessment for local improvements is not a tax within the meaning of the constitutional provision requiring uniformity of taxation. Local assessments are not ordinary taxes levied for the purpose of sustaining the government, but they are charges laid upon individual property because the property upon which the burden is imposed receives a special benefit which is different from the general one which the owner enjoys in common with others, as a citizen of the commonwealth."

If assessments levied for drain purposes are taxes, then also would be those for building sewers, for paving streets, building sidewalks, etc. To be consistent, then the constitutional exemption from taxes, granted to churches, schools, government and state property, cemeteries, property used exclusively for charitable purposes, etc., would exempt them from burdens imposed for the cost of sidewalks, sewers, and pavements and adjacent to their property. Such a doctrine cannot be maintained under the authority at this time. Arnold vs. Mayor, etc., 3 L. R. A., (N. S.), 837 and cases cited.

9 The constitution of North Dakota says: "The legislative assembly shall provide for raising revenues sufficient to defray the expenses of the state for each year ——." "No tax shall be levied except in pursuance of law." "Laws shall be passed taxing by uniform rule, etc." A reading of the entire chapter of our constitution upon Revenue and Taxation clearly shows that the tax there referred to is levied upon the theory that the cost of government is a necessity, and to secure funds to meet those expenses, it has the right to compel all citizens and property within its limits to contribute and that for such contribution it renders no special benefit, but only secures to the citizen that general benefit which results from the protection of his person and property.

Had the framers of our constitution desired to include assessments as well as taxes in the constitutional provision referred to they could easily have done so. At the time of the adoption of our constitution this line of demarkation between taxes and assessments had been clearly made by the courts, and the presumption is that the instrument was framed with this settled distinction in mind. Clearly, then, the case of Valley vs. Park Board of Grand Forks is not applicable at bar, because that had to deal exclusively with a general tax.

An exhaustive examination of all the authorities touching upon the questions here involved are found in the case of Arnold vs. Mayor, supra.

This law therefore not being open to objections stated by counsel, it follows that the demurrer of defendants' counsel should be and the same is hereby sustained. Plaintiff having elected to stand upon the issues as framed, it is now ordered that said action be and the same is hereby dismissed with costs to the defendants.

In the above hearing there appeared for the plaintiffs Messrs. Engerud, Holt & Frame, and for the defendants, Messrs.
10 Theodore Kaldor, States Attorney of Traill County, and John F. Selby. For the Drainage Board of Cass County, which is directly interested in the result of this litigation, appeared Messrs. Ball, Watson, Young & Hardy.

To the foregoing ruling counsel for the plaintiffs except, which exception is allowed and made a part of the record.

Dated August 20, 1907.

Appeal to North Dakota Supreme Court.

Plaintiffs appealed from foregoing order to the Supreme Court of the State of North Dakota by serving and filing the usual notice and undertaking.

Decision and Opinion of State Supreme Court.

The Supreme Court of North Dakota rendered the following opinion on said appeal:

FISK, *J.*:

Plaintiffs who are property owners and residents of Mayville and Morgan townships in Traill County, brought this action in the

district court of said county for the purpose of perpetually enjoining the defendants as drain commissioners from taking any further proceedings towards the construction of a certain drain through such townships and from levying any assessments upon their property for the construction thereof. The district court sustained a demurrer to the complaint and this appeal is from such order. The regularity of all the proceedings of the Board of Drain Commissioners is expressly conceded by appellants, their sole contention being that the drainage law of this state is unconstitutional and void; first, because it is claimed to be in conflict with Sec. 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly, and second, that such law violates Sec. 13 of the state constitution and the 14th amendment to the Federal constitution forbidding the taking of property without due process of law.

11 Appellants' first and chief contention is that the Drainage Law is an unwarranted delegation of legislative power to the Board of Drain Commissioners, the members of which are not elected by and answerable to the people, but are merely appointed by the Board of County Commissioners. Counsel for appellants have presented a very able and plausible argument in support of their contention, basing the same, to a large extent, upon the holding of this court in the recent case of Vallelly vs. Park Commissioners, 111 N. W., 615, and the authorities therein cited. It is vigorously asserted by them that the case is absolutely decisive in their favor of the case at bar. It was there held in effect that the taxing power which is vested by the constitution of the state in the legislative assembly cannot be delegated to a person or body not elected by and responsible to the people. In other words, that the legislature in enacting the Park Commissioner law exceeded its constitutional powers by delegating to the Park Commissioners, who were to be appointed by the city council without any voice on the part of the people, the legislative power of levying general taxes upon the property within the city. It is, of course, clear that if the power to make special assessments is governed by the same principles which govern the assessment and levy of general taxes, the logic of appellants' argument is unanswerable, but if the contrary is true, their argument is entitled to no weight. The questions presented are of the gravest importance to the people of the state and after giving to them the consideration which their importance demands, we are entirely convinced that the act is not vulnerable to the attacks made upon it by appellants' counsel in this case.

We think appellants' counsel are clearly in error in their construction of the Vallelly opinion as well as the opinion in the cases cited therein. None of these cases deal with the question of

12 the constitutional power of the legislature to delegate to an appointive body the right to make special assessments for local improvements, but they merely hold that the power to levy general taxes is a legislative power and that the same cannot be conferred upon such a non-representative body. The evident fallacy in appellants' entire argument in support of their first contention,

as it appears to us, lies in their unwarranted assumption that because the power to levy special assessments for local improvements according to benefits is derived from the taxing power, that it necessarily follows that the power to make such special assessments cannot be delegated to other than representative bodies. While it must, we think, be conceded that under the great weight of authority the levy of special assessments is the exercise of the taxing power—(Hamilton on the Law of Special Assessments #48-50 and cases cited)—still it is equally well settled and will not be denied that the right to order local improvements is derived from the police power, and that the levying of special assessments is a mere incident to the making of such local improvements. Although referable to the taxing power, local assessments are not, strictly speaking, taxes. As said by the Supreme Court of Missouri in speaking of the power to levy special assessments: "The power to make such assessments has been the prolific source of much forensic discussion, and difficulty seems to have existed in tracing this power to its true source and basing it upon a sound principle, but it is settled in Missouri and generally elsewhere that it is referable to the taxing power, though such assessments are not taxes in the sense that word is usually employed." City of Independence vs. Gates, 110 Mo., 374.

In Martin vs. Tuler, 4 N. D., at page 303 of the opinion it is said: "We understand counsel to admit—granting the existence of the power to levy special assessments—that such assessments differ radically in their nature and purpose from ordinary taxation and that the rule which requires uniformity in taxation has no appli-
13 cation whatever to special assessments. This has not become so elementary that citations are unnecessary."

Is the contention of counsel for appellants sound that the power to levy such special assessments can only be delegated to elective or representative bodies? A brief review of the authorities, will, we think, completely demonstrate the utter fallacy of such contention. In Martin vs. Tyler, supra, this court sustained the power of the legislature to delegate to an appointive board of drain commissioners the functions of constructing drains and levying assessments to pay for the same. After quoting from the opinion of the court in Bryant vs. Robbins, 70 Wis., 258, in affirmance of such power, this court said: "Surely this language is applicable to this case. It will not be contended for a moment that, under their general powers, the county commissioners could engage in the work of constructing drains; that they could for that purpose exercise the power of eminent domain, assess benefits, and institute proceedings to ascertain damages. This was a special purpose, and its accomplishment required special legislative authority; which might be placed where the legislature saw proper. See also Sheboygan Co. v. Parker, 3 Wall., 93."

It is true, as counsel for appellants contend, that the precise point here urged was not raised in that case, but the court had the question squarely presented (but on other ground) as to the constitutional right of the legislature to vest in such appointive boards the powers conferred by the drainage act, similar to those conferred by the act in question.

In Erickson v. Cass County, 11 N. D., 494, this court again said: "The legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits." The constitutionality of the drainage law was also sustained in Turnquist v. Drain Commissioners, 11 N. D., 514. In the recent case of State v. Fisk, 15 N. D.., 219, the court said: "The board was acting under the regular ap-
14 pointment pursuant to statutory authority. It had sole and exclusive authority to carry out the provisions of the drainage law. 'The matter to be dealt with was a mere legislative privilege granted upon any conditions the legislature saw fit to impose.'" It is true the precise point now under consideration was neither raised nor discussed in these cases.

The Supreme Court of the United States in Bauman v. Ross, 167 U. S., 548, held that "in the matter of assessing benefits under the right of taxation, it is within the discretion of the legislature to commit the ascertainment of the land to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of the commissioners appointed as the legislature may prescribe."

In People v. Drainage Commissioners, 143 Ill., 417, it was held that drainage commissioners may tax for drainage purposes land in another township where the owner thereof has connected his ditches with those of the district; and that in laying such taxes they act as officers of their district not of the township.

In 2 Cooley on Constittuional Limitations, 3rd Ed., page 1237, it is said: "Where an improvement concerns a municipality, or some portion thereof, to be determined on an investigation of facts, it is most usual for the legislature to confer upon the municipal authorities full authority in the premises; to delegate to them the power to determine whether the improvement shall be made, and, if so, through what subordinate agencies, but under such restraints as are deemed important for public and individual protection, and, not uncommonly, the determination of the rule of apportionment is left to the same authorities. This is not only competent, but in general is deemed the proper course.

"In many cases, however, a special district may be requisite and this may embrace two or more municipalities, or parts of two
15 or more. For this or other reasons any single municipality may be incompetent to deal with the case, and it may be necessary to create a special authority for the purpose. This is particularly the case with drains, with long highways and with levees, and when needful, a commissioner or board of commissioners will perhaps be provided for. It is not doubted that the legislature has authority to do this, when not hindered by any constitutional restriction. The choice of commissioners is sometimes made by the legislature itself, sometimes referred to a court, and sometimes where that course is practicable, given to the people concerned. Other methods of choice according to circumstances are not inadmissable."

And at page 1241, it is further said: "The rule that the legislative authority cannot delegate its powers, is also as imperative here as

elsewhere, thought it might be referred for decision to municipal authority, cannot be left to mere administrative or ministerial officers. But the execution of the rule and the determination of the district, when it is to depend upon facts, is commonly, not only with propriety, but of necessity, left to such officers."

In the case of Foster v. Rowe, 107 N. W., (Wis.), 635, it was held: "The power to equalize taxes is not legislative, in the sense that it cannot be delegated by the legislature to a board. On the contrary, the authority of the legislature to create such boards and authorize courts to appoint them, is well established."

Hamilton on Special Assessments, Sec. 553, lays down the following rule: "It has been said that the assessment is a ministerial act, and may be made by the city engineer where required by statute. That the power of the legislature over the entire scheme of assessment extends to the designation of the person or persons who are to make the assessment, is unquestioned. Yet if the latter be made on the principle of benefits it is certain the person so designated acts judicially, and his acts are valid only when within the
16 bounds of his discretion, judicially exercised."

In 25 A. & E. Enc. of Law, pp. 1219-1220, in speaking of special or local assessments, it is said: "The amount of the assessment, should, of course, be determined and the assessment levied by the officers, board of tribunal specified by the statute. The legislature itself may designate the officers or tribunal to determine the extent of the benefits and assess the persons benefited, or the appointmnt of assessors or commissioners of assesment may be delegated to the city council or to a court of justice." Citing authorities.

In O'Brien & Co. v. County Commissioners, 51 Md., the court held a statute constitutional which provided for a Board of Examiners and Assessors for the purpose of laying out a certain avenue, defining its limits and making assessments for its completion. The court said: "The exercise by the legislature of this power of appointment has been held to be constitutional," citing Mayor, etc., v. Howard, 15 Md., 376.

In Crawford v. People, 82 Ill., 557, it was held that the general assembly of that state had the undoubted power to say who should ascertain and determine the extent of the special benefits and who should assess them.

In the case of Cook v. Nearing, 27 N. Y., 306, the constitutionality of the drainage law of that state which provided for the construction of drains and defraying the expenses thereof by assessing the land benefited, was involved and the court said: "The legislature might lawfully direct the mode and manner of assessing or apportioning such damages upon the persons or property benefitted thereby and designate or appoint the persons to make such assessment or appointment."

In addition to the foregoing authorities we call attention to the following: Egyptian Nav. Co. v. Hardin, 27 Mo. 495; Territory v. Scott, (Dak.) 20 N. W., 401; Mound City v. Miller, 170 Mo.,
17 240; Turner v. City of Detroit, (Mich.), 62 N. W., 405; State vs. Crosby, (Minn.), 99 N. W., 636; Wurts v. Hoag-

land, 114 U. S., 606; Hagart v. Reclamation District, 111 U. S., 701.

It is stated by appellants' counsel that most of the authorities cited and relied upon in Vallelly v. Park Board, supra, were special assessment cases. In this, counsel are also mistaken, as a brief examination of those cases will disclose.

State v. Mayor of Des Moines, 103 Ia., 76, held an act void which authorized a library board appointed by the city council to levy a general tax against the city for library purposes.

Parks v. Board of Commissioners, 61 Fed., 436, had under consideration the validity of an act which attempted to confer upon road commissioners, appointed by the county commissioners, the power to levy a tax against all the property in the county.

Harwood v. Drain Co., 51 Ill., 130, involved the validity of an act which conferred upon a private corporation the power to levy an annual tax upon a specified district for the purpose of constructing and maintaining a levee.

Board of Commissioners v. Abbott, 52 Kans., 148, held an act void which authorized road commissioners appointed by the board of county commissioners to assess and levy by a general tax one-third of the cost of the roads, against the county generally.

People v. Park Commissioners, 28 Mich., 228, involved a statute providing for the appointment of a Board of Park Commissioners and empowered such board to contract general debts against the city for park purposes.

Hinz v. People, 92 Ill., 406, held an act void of the legislature giving appointive police commissioners the power to levy a general tax and create a general indebtedness against the city.

The recent case of Arnold v. Mayor etc. of Knoxville, (Tenn.) 90 S. W., 469, 3 L. R. A. (N. S.), 837, contains a valuable discussion of the nature of special assessments and the principles underlying them, together with a reference to most of the text books and many adjudicated cases relating thereto, where the distinction between such assessments and general taxes is clearly and fully explained.

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We have been unable to find any authority and none has been called to our attention, sustaining appellants' first contention and we conclude that there are none. All the cases, without exception, apparently recognize the constitutional right of the legislature to confer upon local boards or officers, whether elective or appointive, the functions of assessing and apportioning the benefits for local improvements.

It is contended by appellants' counsel that because the Drainage Board is authorized to apportion a part of the cost of a drain to a city, town or township to be raised by general taxation therein, that this is equivalent to the vesting in such board, to this extent, of the power to levy general taxes, and hence is forbidden by the principles enunciated in the Vallelly case. We cannot yield our assent to this contention. The distinction between the principles involved in the Vallelly case and those involved in the case at bar has, we think, been sufficiently pointed out in this opinion. In the one case the delegation of legislative power to levy taxes was involved, while in

the other the power of the legislature to authorize local improvements to be made and to designate the board or officers who shall apportion the benefits and levy special assessments accordingly, was involved. Under the act involved in the Vallelly case it was attempted to confer upon the Board of Park Commissioners the authority to create general indebtedness for park purposes and to levy general taxes against all property within the city to pay the same, while under the drainage law the Drainage Board is given authority to levy special assessments only against lands specially benefitted. And where by the construction of a drain an entire city, town or township receives special benefit therefrom we see no valid
19 reason why such corporation cannot be required as such to contribute its share toward the cost of such local improvement.

In Bryant v. Robbins, supra, the supreme court of Wisconsin in speaking upon a similar question said: "as we have said, the law plainly makes the land which is benefitted by the drainage the principal source from which the means to do the work are derived; and wherever a city or town, as a corporation, is likewise benefited, there is not injustice in charging it to the extent of the benefits received." See also Town of Muskego v. Drainage Commissioners (Wis.) 47 N. W., 11; in re Kingman, (Mass.), 12 L. R. A., 417.

The authority to require such public improvements to be made is derived from the police power although the authority to levy special assessments to pay for the same comes from the taxing power.

It is next contended that the act in question violates the 14th amendment to the Constitution of the United States and Section 13 of the State Constittuion prohibiting the taking of property without due process of law. This contention is based principally upon the first contention. Counsel say in their brief: "In dealing with the objection we make we are not all concerned with how the power is exercised by those who assert the power, but with the right to exercise it at all. * * * If the drainage board could be given any legislative powers of a discretionary nature, then there could be no question that the procedure prescribing the manner of exercising it as found in this Act would fully comply with the requirements of due process." What we have already said upon appellants' first contention is therefore a sufficient answer to this last contention. Furthermore, this court fully disposed of this question adversely to appellants' contention in the following cases; Erickson v. Cass County; State v. Fisk and Turnquist v. Cass County, supra. In State v. Fisk it was said: "The statute imposes upon the board the duty to assess benefits. A review is provided for, and a hearing granted, where evidence may be produced. The board acts judicially
20 in assessing benefits. The board is acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power is exercising functions in their nature judicial. Stone v. Little Yellow Drainage District, 118 Wis., 388, 95 N. W., 405; Dodge County v. Acom et al., (Neb.) 100 N. W., 136; Erickson v. Cass County, supra. * * * In Erickson v.

Cass County the drainage law was construed and its constitutionality upheld as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the Drainage Board with power in good faith and after notice and an opportunity to be heard to finally determine the benefits accruing to each tract of land in the drainage district. * * *." We see no reason to depart from the rule thus so well established in this state. See also Gray's Limitations on Taxing Power, Sec. 1161.

Our conclusion is that the act in question is not vulnerable to any of the objections urged against it and the order appealed from is accordingly affirmed.

All concur.

Remittitur to District Court by Supreme Court.

Thereupon the record was remanded to the District Court affirming the order appealed from.

Substitution of Parties in District Court.

Pursuant to stipulation of parties, the new members of defendant Board of Drain Commissioners, to-wit: Sven Heskin, K. T. Peterson and Hans Kringlen, were substituted as parties defendant in place of A. G. Cormack, J. F. Johnson and C. L. Gordon, the former members who had retired; and the following judgment was entered in the District Court of Traill County, North Dakota on the 30th day of March, 1909.

Judgment.

The above entitled action having been commenced against A. G. Cormack, J. F. Johnson and C. L. Gordon, constituting the County Board of Drain Commissioners of Traill County, North Dakota, and the issues arising on the defendants' demurrer to the com-
21 plaint having been determined adversely to the plaintiffs, and the Supreme Court having affirmed the decision of the District Court on said demurrer, and the plaintiffs having elected to stand on said Complaint and declined to amend their answer; and C. L. Gordon, A. G. Cormack and J. F. Johnson having retired as members of said Board, and K. T. Peterson, Hans Kringlen and Sven Heskin having been substituted in the place of said retiring members, and it having been ordered that said K. T. Peterson, Hans Kringlen and Sven Heskin be substituted as parties defendant in this action in place of said retiring members of said Board; and the Court having ordered judgment in accordance with the decision of the Supreme Court;

Now, therefore, in compliance with the decision of the Supreme Court, and to conform to the proceedings heretofore had,

It is hereby adjudged, determined and decreed that said action be and the same is hereby in all things dismissed on the merits, and that the plaintiffs take nothing herein.

It is further adjudged, determined and decreed that the defendants have and recover from the plaintiffs the sum of Fifty-nine and no/100 Dollars costs and disbursements as taxed herein.

Petition for and Allowance of Writ of Error.

The plaintiffs in said cause thereupon presented to Hon. D. E. Morgan, Chief Justice of the Supreme Court of the State of North Dakota, a petition in the usual form for the allowance of a writ of error for the review of said judgment by the Supreme Court of the United States, and said petition was duly granted and a writ of error directed to be issued.

22 *Assignments of Error.*

Come now M. E. Soliah, W. H. M. Lyche and J. O. Staupe by their attorneys, and say that in the record and proceedings aforesaid there is manifest error in the rulings and decision in said action as follows, to-wit:

1. The Supreme Court of the State of North Dakota erred in holding and deciding that the statute in question in this action, and particularly Sections 1818 and 1850 of the Revised Codes of North Dakota of the year 1905, do not make an unwarranted delegation of legislative power to the Board of County Drain Commissioners.

2. The Supreme Court of the State of North Dakota erred in holding and deciding that the levying of special assessments for local improvements is not controlled in its exercise by the same general principles as apply to the exercise of the power of taxation.

3. The Supreme Court of the State of North Dakota erred in holding and deciding that the exercise of the powers conferred upon the Board of Drain Commissioners by the North Dakota Drainage Law (Chapter 23 Political Code of North Dakota for 1905; Revised Codes, 1905, Secs. 1818 et seq.) did not contravene that provision of the Fourteenth Amendment of the United States Constitution which prohibits any State to deprive any person of his property without due process of law.

4. The Supreme Court of the State of North Dakota erred in holding and deciding that the facts stated in the Complaint did not show that the acts of the defendants, if permitted to proceed, would not deprive the plaintiffs of property without due process of law.

5. For the reasons aforesaid the Supreme Court of the State of North Dakota erred in sustain- the defendants' Demurrer
23 to the Complaint; and the judgment in said action is therefore erroneous.

And the plaintiffs in error therefore pray that said judgment be reversed, annulled and held for nothing, and that plaintiffs in error be restored to all things lost by reason of said judgment.

Bond on Writ of Error.

Plaintiffs in error executed and filed a bond for costs in the usual form in the sum of Five Hundred Dollars, which bond and the sureties thereon were duly approved.

The foregoing is a full and correct transcript of all material parts of the record and it is agreed that the same may be printed as the record in said cause.

EDWARD ENGERUD,
Attorney for Pl'ff- in Error.
JOHN S. WATSON,
Attorney for Defendant in Error.

24 [Endorsed:] File No. 21,735. Supreme Court U. S. October Term, 1910. Term No. 255. M. E. Soliah et al., Pl'ffs in Error, vs. Sven Heskin et al., etc. Agreed record. Filed May 29, 1911.

BRIEF FOR PLAINTIFFS IN ERROR

SUPREME COURT OF THE UNITED STATES

October Term, 1911

No. 76

M. E. SOLIAH, W. H. M. LYCHE, AND J. O. STAUPE,
Plaintiffs in Error,

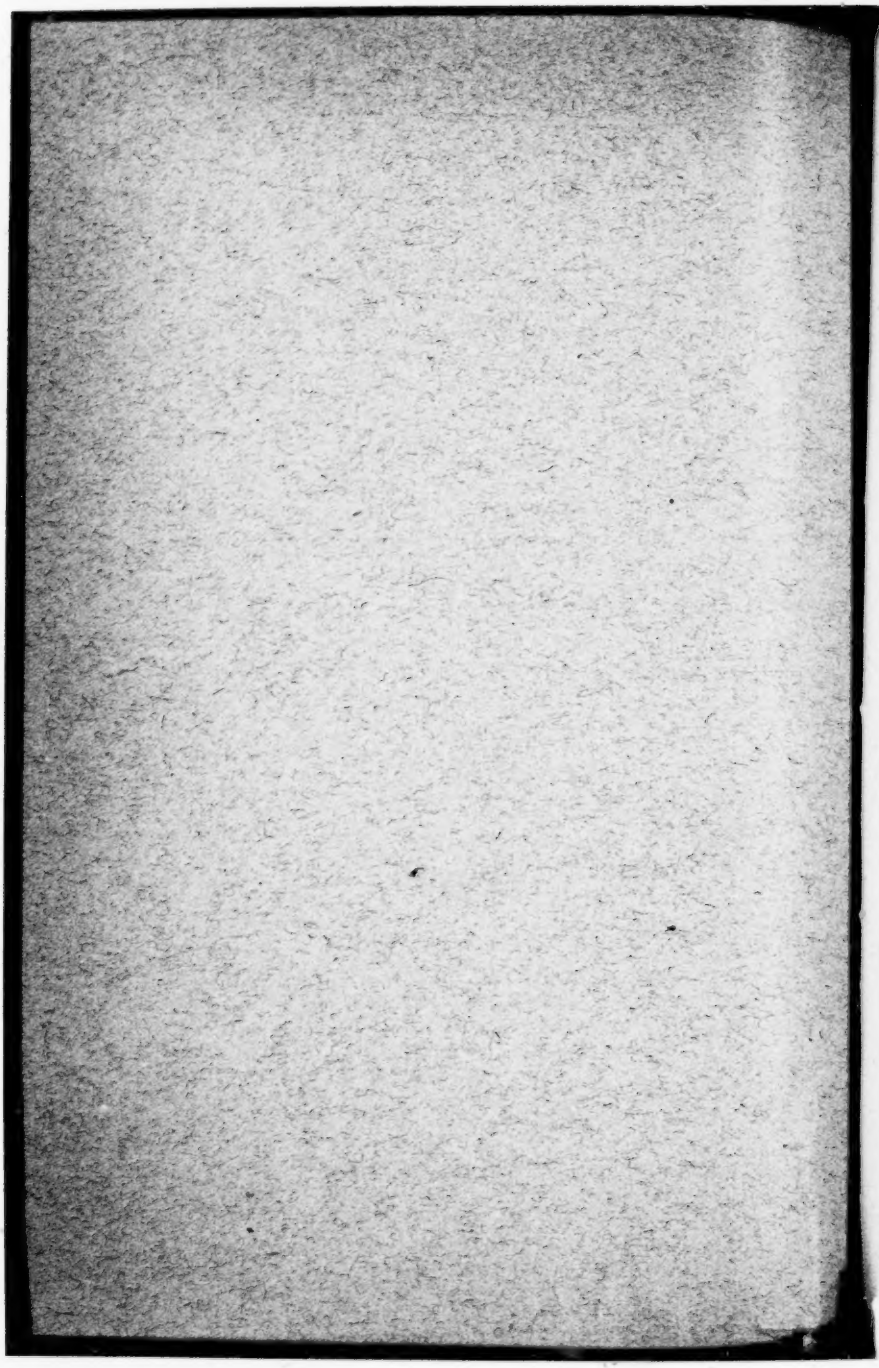
vs.

SVEN HESKIN, K. T. PETERSON AND HANS KRINGLEN, Constituting the Board of County Drain Commissioners in and for Traill County, North Dakota,
Defendants in Error.

In Error to the District Court of Traill County, State of North Dakota.

EDWARD ENGERUD,
Attorney for Plaintiffs in Error.

ENGERUD, HOLT & FRAME,
P. G. SWENSON,
of Counsel.



SUPREME COURT OF THE UNITED STATES

October Term, 1911

No. 76

M. E. SOLIAH, et al.,

Plaintiffs in Error,

vs.

SVEN HESKIN, et al., constituting the Board of County Drain Commissioners of Traill County, North Dakota,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

This case was commenced in the District Court, Traill County, North Dakota. The cause of action appears in the Complaint (Printed Record pp. 1-3). In effect the allegations are that the defendants as the Board of County Drain Commissioners of Traill County, N. D. pursuant to the provisions of the drainage law of North Dakota (Ch. 23 Pol. Code of North Dakota) which purported to invest the Board with such authority, had established and were about to construct a drainage ditch known as "North Mayville Drain No. 8" which is particularly described; that the estimated cost of constructing the drain was $15,800; that the Board under the pretended authority of the drainage Statute intended and had resolved to pay for the cost of said drain by means of special assessments levied in part upon the lands which the Board had determined were to be benefitted by the drain (including the plaintiff's lands) and in part upon the organized Townships of Mayville and Morgan of which plaintiffs were residents and taxpayers; and which assessments on said townships would be paid by general taxation of the property in said townships; that the drainage Board was thus proceeding under the pretended authority of said legislative act notwithstanding plaintiffs' protests. The plaintiffs sue for themselves and all others similarly situated. The prayer for judgment is that the defendants be perpetually enjoined from constructing the proposed drain and from levying assessments to pay therefor and all their proceedings be declared void and for general equitable relief.

The Complaint explicitly admits that the proceedings of the Board were all had in accordance with the provisions of

the drainage act in question; the contention being that the Act was void because of conflict with both the State and Federal Constitution.

Defendants interposed a general demurrer to the complaint. (Printed Record p. 4).

The District Court sustained the demurrer, giving its reasons at length. (Printed Record pp. 4-6).

Plaintiffs thereupon appealed to the Supreme Court of North Dakota. (Printed Record p. 6).

The Supreme Court affirmed the decision of the District Court and (in accordance with the practice of that State) remitted the record of the District Court, where judgment was entered dismissing the action on the merits in accordance with the decision of the Supreme Court. (Printed Record pp. 6-13).

Thereupon plaintiffs sued out the writ of error and removed the case to this Court for review.)Printed Record p. 14).

The personnel of the defendant Drainage Board having changed the new members were substituted as parties defendant for the old. (Printed Record p. 13.)

The drainage law, the constitutionality of which is in question, is Chapter 23 of the North Dakota Political Code as found in the North Dakota Revised Code of 1905, Sections 1818, et. seq., as amended by Ch. 93 Laws of 1907. The law as amended reads as follows: (In copying the law herein we retain the Section numbers as in the Revised Code of 1905. The Sections in the revision appear in the same order as in the original Act. *The amendments made by the law of 1907 are indicated by italics. The italicized words are the amendments of 1907*).

COPY OF DRAINAGE STATUTE.

Sec. 1818. Water courses, ditches and drains for the drainage of sloughs and other low lands may be established, constructed and maintained in the several Counties of this State whenever the same shall be conducive to the public health, convenience or welfare under the provisions of this Chapter. The word "drain" when used in this Chapter shall be deemed to include any natural water course opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for such purpose.

Sec. 1819. The Board of County Commissioners of any organized County in this State shall have power and is authorized at any meeting of the Board by a majority vote of all the members to appoint *on its own motion or* on the petition of any person interested, three freeholders of the

County, as a Board of Drain Commissioners of such County, who shall hold office for two years, and until their successors are appointed and qualified. The Board of County Commissioners may remove for cause any or all of such drain Commissioners, and in case of a vacancy may fill the same by appointment. *The Board of County Commissioners shall provide an office for said Board of Drain Commissioners at the County Seat, suitable for its use and the keeping of its records, and shall provide suitable record books for its use.*

Sec. 1820. Any person appointed as a member of the Board of Drain Commissioners shall within ten days after his appointment take, subscribe and file in the office of the County Auditor an oath faithfully to perform the duties of a drain Commissioner under the law, and within the same time make, execute and file in the Auditor's office a bond to the County with sureties to be approved by the Auditor in such sum as shall be ordered by the Board of County Commissioners, conditioned for the faithful discharge of his duties as Drain Commissioner. *The members of the drainage board shall organize by electing from their number a chairman and a secretary; they shall keep an office at the County Seat at which all hearings upon notice shall be held and shall keep a record of its acts and proceedings and a separate record of the proceedings relating to each separate drain, all of which shall be open for public inspection, and such records shall have the same force and effect as other public records. Two members of said Board shall at all times constitute a quorum for the transaction of business. Said Board may, when in its judgment it is necessary, employ a clerk and fix his compensation; it may also employ and call to its assistance a competent surveyor. The State's Attorney of each County shall, so far as his other duties will permit, act as the legal advisor of the Board. The Board may, however, by and with the consent of the County Commissioners, employ other counsel to advise and represent it in its proceedings.*

Sec. 1821. A petition for the construction of a drain may be made in writing to the Board of drain commissioners, *which petition shall designate the starting point and terminus and general course of the proposed drain.* If among the leading purposes of the proposed drain are benefits to the health, convenience or welfare of the people of any city or other municipality, the petition shall be signed by a sufficient number of the citizens of such municipality or municipalities to satisfy the Board of drain commissioners that there is a public demand for such drain. If the chief purpose of such drain is the drainage of agricultural, meadow, grazing or other lands the petition shall be signed by at least six or more freeholders whose property shall be affected by the proposed drain. Upon the presentation of a petition as hereinbefore provided, and filing of the same, the board of drain commis-

sioners shall personally as soon as practicable proceed to examine the line of the proposed drain, and if in its opinion it is necessary for the public good, *it shall enter a resolution to that effect and shall also enter a resolution designating a competent surveyor who shall survey the line thereof* and establish the commencement and terminus, and determine the route, width, length and depth thereof. For the purpose of making examinations or surveys the Board of drain commissioners, surveyors and their employes may enter upon land traversed by any such proposed drain, or upon other lands when necessary. Such surveyor shall prepare profiles, plans and specifications of the proposed drain, an estimate of the cost thereof and a map or plat of the lands to be drained, in duplicate, showing the regular sub-divisions thereof, one copy of which shall be filed in the office of the County Auditor in the County in which the drain is proposed to be constructed *and the other with the Board of Drain Commissioners*, subject to inspection. In locating a drain the board of drain commissioners may, under the advice of the surveyor, vary from the line described in the petition as it seems best. When the line proposed is along highways already established, the drain shall be located at a sufficient distance from the center of such highway to permit a good road along the central line thereof; when the length of the line described in the petition does not give sufficient fall to drain the lands sought to be drained the board of drain commissioners may extend the drain below the outlet named in the petition far enough to obtain a sufficient fall and outlet. Drains shall, as far as practicable be located on dividing lines between sections or regular sub-divisions thereof, but the general utility of the drain must not be sacrificed to avoid crossing any tract of land in such direction as the Board of drain Commissioners find advisable. *Upon the filing of the surveyor's report the board of drain commissioners shall fix a date for hearing objections to the petition, and shall give notice of such hearing by causing five notices to be posted along the line of the proposed drain at such points as will be likely, in the opinion of the Board to secure the greatest publicity. Such notices shall contain a copy of the petition and a statement of the date of filing of the surveyor's report, and the date when the board will act upon the petition, and shall be signed by the members of the board or a majority thereof.* All persons whose land may be affected by any such drain may appear before the board of drain commissioners and fully express their opinion *and offer evidence* upon the matters pertaining thereto.

Sec. 1822. If upon *the examination by the board of drain commissioners before the survey has been made, or if upon the hearing upon the petition* or upon the trial in the District Court it shall appear that there was not sufficient cause for making such petition, or that the proposed drain

would cost more than the amount of benefit to be derived therefrom, the Board of drain commissioners shall deny the petition and the petitioners shall be jointly and severally liable to such board for all costs and expenses incurred in the proceedings, to be recovered by such board by action. If it shall appear that there was sufficient cause for the making of such petition and that the proposed drain will not cost more than the amount of the benefits to be derived therefrom the Board of drain commissioners shall thereupon make an order establishing the drain, *accurately describing it*, and give the same a name by which it shall be recorded and indexed.

Sec. 1823. The right-of-way for the construction of any proposed drain, if not conveyed to the County by the owner, may be acquired in such manner as may now or hereafter be prescribed by law. Such right-of-way, when acquired, shall be the property of the County.

Sec. 1824. Upon the assessment by the jury, court or referee, of the amount of damages to which the respective owners of the right-of-way to be used for the construction of any proposed drain are entitled, the Board of drain commissioners may issue warrants in a sum sufficient to pay the damages assessed for right-of-way, drawn upon the proper county treasurer, and payable out of any funds in the hands of the treasurer, for the construction of the drain for which such right-of-way is sought to be obtained, and shall negotiate the same at not less than the par value thereof, and pay into Court for the benefit of the owners of the right-of-way the amount to which each is entitled according to the assessment of damages, paying the surplus, if any, to the county treasurer, who shall place the same to the credit of the proper drain fund. If warrants cannot be negotiated, the board of drain commissioners shall assess the per cent of the cost of acquiring the right-of-way in the manner provided in Section 1826, making return to the County Auditor containing all that is required in Section 1827, and make, serve and file the list provided for in Section 1831, and no further proceedings shall be taken until the special tax levied to pay for the right-of-way is collected and paid into court for the benefit of the owners of the right-of-way.

Sec. 1825. Every assessment of benefits provided for in this chapter shall be subject to review and ten days' notice of the time and place when and where such assessment will be reviewed by the board of drain commissioners shall be given in the manner provided in section 1828. At the time and place appointed such board shall proceed to hear all complaints relative to such assessment and correct or confirm the same.

Sec. 1826. Upon acquiring the right-of-way, if the assessment of benefits has not already been made under the pro-

visions of Section 1824, the board of drain commissioners shall assess the per cent of the cost of constructing and maintaining such drain, and of providing the right-of-way therefor, which any county, township, city, village or town shall be liable to pay by reason of the benefits of such drain to the public health, convenience, or welfare, and which any railroad company shall be liable to pay by reason of benefits to accrue to its property, and which any lot, piece or parcel of land shall be liable to pay by reason of benefits to accrue thereto, either directly or indirectly, by reason of the construction of such drain, whether such lands are immediately drained thereby, or can be drained only by the construction of other and connecting drains, but such assessment shall be subject to review by the commissioners as hereinafter provided.

Sec. 1827. After the assessment of benefits has been made, as provided in the last section, *and has been confirmed upon the hearing, and the specific amounts of each assessment have been extended as hereinafter provided*, the board of drain commissioners shall make return thereof to the County auditor, who shall record the same in a book to be provided by the county for that purpose. Such return shall contain the petition for the drain, the minutes of the survey signed by the surveyor, a copy of the order establishing the drain, conveyance of the right-of-way, if any, and the assessment of benefits.

Sec. 1828. *After completing the percentage assessment as hereinbefore provided*, the board of drain commissioners shall without delay divide the line thereof into convenient divisions for construction, make diagrams of the same with specifications of the width of excavations at the bottom, the slope of the sides, and such other matters as may be necessary for the proper construction of the drain, and set suitable stakes in such places as may be necessary to show the beginning and end of divisions, and grade stakes to show the depth of cuts at such intervals as may be necessary. Such board shall give at least ten days' notice of the time when and the place where they will meet parties for the purpose of letting contracts for such construction. Such notice shall be published in some newspaper of general circulation in the county and printed notices not less than five in all and at least one in each township or municipality interested in such drain shall be posted in such township and municipalities at such points as will be likely, in the opinion of the board, to secure the greatest publicity for such notice. Such notice shall also state that at the time and place of such letting of contracts the assessment of benefits will be subject to review, unless such assessment has already been reviewed, under the provisions of Section 1825.

Sec. 1829. *At the time and place appointed the board of*

drain commissioners shall proceed to hear all complaints relative to such assessments, unless a hearing has already been had under the provisions of Section 1825, and correct and confirm the same. Such board shall then proceed to let contracts for the construction of the drain by divisions as it shall have divided the same, to the persons who will do the work according to the specifications, for the lowest price and give adequate security for the performance of the same within such time as the contract shall specify. Such board may adjourn such letting in whole or in part and from time to time to such other time and place, to be by it at the time of such adjournment publicly announced, as shall to it seem proper and it may reserve the right to reject any and all bids. The parties who are to be assessed for the construction of such drain and who may be bidders for contracts thereon shall, if equal bidders with other parties, be preferred in the awarding of such contracts; provided, that contracts for the building of bridges and culverts mentioned in Section 1838 may be deferred, until the construction of the drain has reached such a stage of completion that the character of the bridges and culverts which will be needed can be determined. As soon as the character of such bridges and culverts can be determined such board shall cause plans and specifications of the bridges and culverts to be constructed in connection with such drain to be prepared and shall give at least ten days' notice of the time and place when and where it will meet parties for the purpose of letting contracts for such construction. Such notice shall be published in some newspaper of general circulation in the county. Such contracts shall be let to the lowest bidder as hereinbefore in this section provided.

Sec. 1830. After the letting of such contracts or a major portion thereof such board shall make a computation of the cost of such drain which shall include all the expenses of locating and establishing the same, including the cost of right-of-way, the drain commissioners' fees, cost of survey, cost of building bridges and culverts, interest on all warrants issued or to be issued by the board of drain commissioners on account of the drain, accumulated or to accumulate prior to the time when the tax levied or to be levied to pay for the right-of-way or construction of the drain is collectible by law and all other expenses and the amount of the contracts and in case contracts shall not have been let for the construction of the whole of the drain or of the bridges or culverts, the board of drain commissioners shall estimate the cost of such unlet portion and of the bridges and culverts, predicating its estimate so far as may be upon the cost of those portions that have been let or upon similar work. The sum of all the costs and expenses incurred or to be incurred shall be the cost of the construction of the drain.

Sec. 1831. *After fixing the cost of the construction of the drain, as provided in the preceding section,* the Board of drain commissioners shall *carry out upon the assessment list the specific amount* which each municipality and lot or tract of land benefitted by the drain for which the tax is levied is liable to pay on account of procuring the right-of-way or the construction of any drain, or both, according to the per cent which by section 1826 it is required to fix and determine, a copy of which shall be served on the clerk or auditor of each municipality against which taxes are to be assessed. Such list shall thereupon be filed in the office of the county auditor of the county in which the municipalities and lands benefitted by the drain are situated, and the auditor shall thereupon extend upon the tax lists as a special tax as provided by law the several amounts shown by the drain commissioners' list, specifying in such tax lists the particular drain for the construction or procurement of the right-of-way of which the special tax is assessed, which special tax shall be collected and enforced in the same manner as other taxes. When such special tax is for the right-of-way, the same shall when collected be paid by the county treasurer into court for the benefit of the owners of the right-of-way, and the common council, or other proper taxing authorities of each city or other municipality against which such assessment is made as aforesaid, shall include in the first general tax levy thereafter made in said city or municipality the amount so assessed against it by the board of drain commissioners, and the same shall be extended upon the tax lists of the county for the current year by the county auditor against all the taxable property in such city or municipality in the same manner and with the same effect as other taxes are extended.

Sec. 1832. The drain taxes shall be collected by the County treasurer, and all moneys so collected shall be credited to the drain fund to which they belong, and the county treasurer shall be the treasurer of such drain funds. Payment of all expenses and costs of locating and constructing any drain shall be made by the board of drain commissioners issuing warrants in such amounts and to such persons as by such board may be found due, *which warrants shall be signed by the chairman and secretary.* All warrants drawn by such board in payment for the right-of-way or construction of any drain shall be payable from the proper drain fund and shall be receivable for the taxes levied for the right-of-way or construction of such drain by the treasurer. All such warrants after presentation to the County treasurer for payment, if not paid for want of funds, shall be registered by the County treasurer and shall thereafter bear interest at the rate of seven per cent per annum.

Sec. 1833. In case the amount realized from the assessment made for right-of-way or for the construction of any

drain shall not be sufficient to pay for such right-of-way or to complete such drain, and to pay fees and all incidental expenses, or in case an enlargement or deepening of such drain or an extension of the line thereof becomes necessary, a further assessment shall be made to meet the deficit or additional expense, and the amount thereof shall be levied and collected in the manner hereinbefore provided.

Sec. 1834. The board of drain commissioners shall have power to grant a reasonable extension of time for the completion of any contract. When any contract shall not be finished within the time specified, or to which it may be extended, the board of drain commissioners may in its discretion at any time thereafter, re-let such unfinished portion or any part thereof, after not less than five days' notice thereof to the lowest responsible bidder and shall take security as before. The cost of completing such parts over and above the contract price, and the expense of notices and re-letting shall be collected by the board of drain commissioners of the parties at first contracting; provided, that in no case shall the board of drain commissioners forfeit and annul a contract without five days' notice to the contractor, if found, and if not found, then by written notice left at his last place of residence, if known to be within the county.

Sec. 1835. The powers conferred by this chapter for establishing and constructing drains shall also extend to and include the deepening and widening of any drains which have heretofore been or may hereafter be constructed; also to straightening, clearing out and deepening the channels of creeks and streams and the construction, maintaining, remodeling and repairing of levees, dykes and barriers for the purpose of drainage, and the board of drain commissioners may locate or extend the line of any drain if the same is necessary to provide a suitable outlet, and shall cause a survey thereof to be made, *and may establish a drain upon the line of an abandoned drain, and complete the same, or in whole or in part upon the line of an invalid drain. It may also establish and construct lateral drains with outlets in drains heretofore constructed; provided, however, that all proceedings under this section affecting the rights of persons and property shall only be taken upon the petition and in accordance with the procedure governing the establishment and construction of drains in the first instance. Whenever the widening, extending or deepening of a main drain is made necessary by the construction of a lateral drain, the petition for the lateral drain shall contain a request for such widening, deepening or extension, and the cost of such widening, deepening or extension shall be charged as a part of the cost of construction of the drain petitioned for and assessed against the property benefitted thereby as a part of the cost of the construction.*

Sec. 1836. Whenever it shall be deemed necessary by the boards of drain commissioners of two or more counties in this State, to construct or extend a drain through or into two or more counties in this state, it shall be lawful and the several boards of drain commissioners in the counties into or through which such proposed drain may extend when completed, are empowered to establish, construct and maintain such drain through or into two or more counties in manner following, to-wit: There shall first be presented to the several boards of drain commissioners in each of such counties a petition for the establishment of such drain in their several counties as provided by law and such commissioners of such several counties shall determine upon the necessity or expediency of the establishment of such drain as provided by law. The several boards of drain commissioners of all counties through or into which such proposed drain may run shall then meet and agree upon the proportion of damages and benefits to accrue to the lands affected in each county affected and for this purpose they shall consider the entire course of said drain through all said counties as one drain. They may apportion the cost of establishing and constructing such entire drain ratably and equitably upon the lands in each county in porportion to the benefits to accrue to such lands, and when they have so apportioned the same they shall make written reports of such apportionment to the auditors of the several counties affected, which reports shall show the portion of cost of such entire drain to be paid by tax upon the lands in each of such counties and such reports shall be signed by the boards of drain commissioners of all counties affected. Upon the filing of such reports, the several boards of drain commissioners shall meet and assess against the lands in each of such counties ratably and equitably as provided by law an amount sufficient to pay the portion of cost of such drain in each of such counties so fixed by all said commissioners.

Sec. 1837. Drains may be laid along, within the limits of or across any public road, and when so laid out and constructed or when any road shall thereafter be constructed along or across any drain it shall be the duty of the board of county commissioners, or township supervisors, as the case may be, to keep the same open and free from all obstructions. A drain may be laid along any railroad when necessary, but not to the injury of such road, and when it shall be necessary to run a drain across a railroad it shall be the duty of such railroad company, when notified by the board of drain commissioners to do so, to make the necessary opening through said road and to build and keep in repair suitable culverts or bridges.

Sec. 1838. When any drain crosses a highway the cost of constructing the necessary bridge or culvert shall be charg-

ed in the first instance as part of the cost of constructing ... drain, after which such bridge or culvert shall be maintained as part of the highway. The board of drain commissioners shall construct such bridges or culverts over or in connection with each drain as may in its judgment be necessary to furnish a passage from one part to another of any farm or tract of land intersected by such drain and the cost of the construction thereof shall be charged as part of the cost of constructing such drain and such bridge or passageway shall be maintained under the authority of the board of county commissioners or township supervisors, as the case may be, and the necessary expense thereof shall be deemed a part of the cost of keeping such drain open and in repair.

Sec. 1839. Blind drains may be constructed by the use of drain tile or sewer pipe, when the nature of the ground will admit of so doing. When blind drains are constructed the entrance shall be protected from drift wood and other debris.

Sec. 1840. All drains regularly established, opened or constructed under the provisions of any law shall be deemed legal drains *and shall be under the control and charge of the County commissioners*, and it shall be the duty of all boards of county commissioners in cases where the records of any drain may not have been preserved to see that such record is made in the best manner practicable in the office of the county auditor, *and whenever necessary it shall be their duty to complete the records of such drain so as to show their legal character. Said board shall provide a book to be known as "Record of Drains", in which such records shall be recorded.*

Sec. 1841. The collection of no tax assessment levied or ordered to be levied to pay for the location and construction of any drain laid out and constructed under this chapter, shall be perpetually enjoined or declared absolutely void in consequence of any error of any officer or board in the location and establishment thereof, nor by reason of any error or informality appearing in the record of the proceedings by which any drain shall have been located or established, nor for want of proper conveyance or condemnation of the right-of-way, but the court in which any proceeding may hereafter be brought to reverse or to declare void the proceedings by which any drain has been located or established or to enjoin the tax levied to pay the labor and cost and expenses shall on application of either party appoint such person or persons to examine the premises, or to survey the same, or both, as may be deemed necessary and the court shall on a final hearing make such order in the premises as shall be just and equitable, and may order such tax to remain on the tax list for collection, or any part thereof, or if the same shall have been paid under protest shall order the whole or such part thereof as may be just and equitable to be refunded, the costs

of said proceedings to be apportioned among the parties as justice may require. If any proceeding for the location, establishment or construction of any drain under the provisions of this chapter, have been heretofore, or shall be hereafter enjoined, vacated, set aside, declared void, or voluntarily abandoned by the board of drain commissioners, in consequence of any error, irregularly or want of jurisdiction affecting the validity of such proceedings, and if any drainage warrants have been or shall hereafter be issued in connection with such aforesaid invalid or abandoned proceedings, the board of drain commissioners may nevertheless proceed under the provisions of this chapter to locate, establish and construct drains under the same or different names, and in the same or different locations from those described in the invalid or abandoned proceedings; provided, however, such new proceedings shall be in accordance with the general provisions of this chapter. In case new proceedings shall be had, resulting in the location and establishment of a drain in the same or substantially the same location as that described in the invalid or abandoned proceedings, then the board of drain commissioners shall proceed to ascertain and determine the real value of services rendered, moneys expended, and work done under such invalid or abandoned proceedings, and the extent to which the same have contributed or will contribute to the construction and completion of such drain as subsequently established and constructed. A meeting of said board of drain commissioners shall be held for the purpose of determining and fixing the value aforesaid, at which meeting all persons interested, whether as holders of warrants issued under invalid or abandoned proceedings, or as owners of land benefitted or to be benefitted by such drain, may appear and be heard. Ten days' notice of such meeting shall be given, in the manner, at the time, and as a part of the notice provided for in Sections 1825 or 1828, and the notice as published shall state briefly the purpose of such meeting, and that all persons interested may appear and be heard. The board shall thereupon, and after such hearing, by an order made and entered in their minutes, find and determine: (1) the real value of all work done, money expended and services rendered under such invalid or abandoned proceedings, to the extent only to which they contribute to the drain as subsequently located and established; (2) the names of all persons or corporations owning or holding drain warrants issued under such invalid or abandoned proceedings, and the dates and several amounts of such warrants. The board shall then proceed to issue warrants to an amount not exceeding the value of the work done, moneys expended and services rendered under such invalid or abandoned proceedings, and deliver such new warrants to the owner or holder of the old warrants upon surrender and return of the latter; provided,

however, that the value of any service rendered, or money expended, or work done, shall in no case be declared to be greater than the warrant issued therefor, under the invalid or abandoned proceedings, and if found to be less, the new warrant shall not be issued or delivered except upon the surrender and return of the old warrant, in lieu of which it is issued. The real purpose and intent of this section is to afford compensation for services rendered, work done, and moneys expended, under invalid or abandoned proceedings, to the extent only to which the same contributes to the completion of a drain located and established in pursuance of the provisions of this chapter.

Sec. 1842. All drains that may have been constructed under any law of this State, or that may be constructed under the provisions of this chapter and situated in this State, shall, except as otherwise provided be under the charge of the Board of County Commissioners and their successors in office and be by them kept open and in repair. In all cases when any completed drain is or may be situated in more than one county the care of the portion thereof lying within any county is hereby assigned to the board of county commissioners of such county to be by it kept open and in repair. The cost of such keeping open and in repair shall in all cases be assessed, levied and collected in the same manner as is provided in this chapter for the construction of drains in the first instance, and in cases when no assessments of benefits shall have been made, the board of commissioners having charge of or to whose care such drain may be assigned shall make such assessment.

Sec. 1843. The board of County Commissioners of any county may make rules and regulations on the subject of drainage within such county, as it may deem proper, not inconsistent with the provisions of this chapter and especially with regard to clearing out and keeping clear the channels of streams and the construction and maintenance of dams thereupon, with reference to their capacity for drainage and may require of the owners of such dams reasonable service in cleaning and keeping such streams clear as a consideration for the right to erect dams thereupon.

Sec. 1844. Each board of drain commissioners shall make a report to the board of county commisioners of all drains begun, in process of construction or finished and shall also render a full account of all moneys which shall come into its hands; and every drain commissioner shall be liable on his bond for any misapplication of money coming into his hands as such commissioner. The report required by this section shall include an itemized statement of all expenses and warrants drawn on account of each and every drain.

Sec. 1845. Drain commissioners shall receive for their services such amount, not less than two nor exceeding three

dollars per day, for the time actually spent by them in performing the duties of their offices as may be fixed by the board of county commissioners. Publishers of newspapers shall receive for publishing legal notices and furnishing evidence of such publication the fees prescribed by law for legal advertisements.

Sec. 1846. If any person shall wilfully and maliciously remove any surveyor's stake set along the line of any drain laid out under the provisions of this chapter, or obstruct or injure any such drain, he shall for each and every such offense be subject to a penalty not exceeding ten dollars together with such sum as will be required to repair such damage and costs of suit, which penalty may be recovered in an action by the board of drain commissioners or county commissioners as the case may be. Whenever the amount of any recovery shall be collected it shall be deposited with the county treasurer to the credit of the proper drain fund.

Sec. 1847. No person holding any state or county office shall be eligible to the office of drain commissioner, and any drain commissioner accepting any state or county office shall thereupon be considered as having vacated the office of drain commissioner.

Sec. 1848. Drain commissioners shall have power to administer any oath required in any proceeding had before them or in which they may be called to act officially.

Sec. 1849. The board of county commissioners of any county in which any such drain is proposed to be located and constructed is authorized to issue bonds *which shall be known as drainage bonds*, in such sums as may be necessary for the purpose of defraying the expenses incurred or to be incurred in obtaining the right-of-way or in locating or constructing any such drain, said word "expenses" to be construed to mean and to cover every item of cost of such drain from its inception to its completion as hereinbefore provided, which bonds shall be paid out of the revenues to be derived from taxes levied, or to be levied, and collected from that portion of the county found by the board of drain commissioners to be benefitted thereby. Such bonds shall bear interest at a rate not exceeding seven per cent *and shall be divided in such amounts and payable at such periods not exceeding fifteen years, as the board of county commissioners may determine;* provided, that any land owner who may desire to pay the entire amount assessed against his land for the entire cost of such drain, including warrants and interest thereon, may, prior to the sale of such bonds, pay into the county treasury the amount of said assessments for which the treasurer shall give his receipt in full, and such lands shall not be included in the list of the lands assessed. *The county auditor shall give notice of the determination of the board of county commissioners to issue bonds by publishing a notice in the of-*

ficial newspaper of the county at least fifteen days before the date of selling said bonds. Said notice shall designate the drain proposed to be bonded, and in general terms notify all persons interested of their right to pay their total assessment prior to the date of the sale of said bonds, as provided in this section. The money paid in shall be used to take up warrants, and the bonds issued shall be for such an amount as will pay the remainder of the cost of construction; and the said board shall provide sinking funds for the payment at maturity of each series of bonds issued and for the payment of the annual interest on the same. The bonds issued under the provisions of this chapter shall be signed by the chairman of the board of county commissioners of such county and countersigned by the county auditor, who shall keep a record of the bonds issued under the provisions of this chapter. Such board shall have the power to negotiate such bonds at not less than the par value thereof as it may deem for the best interest of all persons interested in such drain. Such bonds shall contain a recital that the same are issued in accordance with the provisions and pursuant to the authority of this chapter and that they are to be paid out of sinking funds to be created as in this chapter provided. Whenever such bonds shall be issued the tax hereinbefore provided for shall not be collected all in one year, but shall be divided into parts corresponding with the amounts and maturities of the bonds, and such parts shall be extended year by year upon the tax lists by the county auditor against the proper parcels of land and property liable to taxation for that purpose and collected in such year, and such fund shall constitute the sinking fund provided by this section.

Sec. 1850. The board of county commissioners shall in each year at the time of levying the taxes, levy upon the property liable to taxation on account of the location and construction of any drain a tax sufficient to pay the annual interest on any bonds which may have been issued for the purpose of locating and constructing the drain. Separate sinking funds shall be provided for each separate drain for the construction of which bonds shall have been issued, and no funds in any such sinking fund shall be applied to any other purpose than the payment of the bonds for the payment of which such fund was created. No county shall be liable for the payment of any bonds issued under the provisions of this chapter, but such bonds shall be paid only out of the sinking funds created as in this chapter provided.

Plaintiffs contended in both the District and Supreme Court of North Dakota that the act violated the 14th Amendment of the United States Constitution in that the proceedings under it would deprive plaintiffs and other property

owners affected by the proceedings of their property without due process of law. This contention was squarely overruled by the State Courts. (Printed Record p. 12).

Plaintiffs contend that the decision of the State Court was erroneous for the reasons set forth in the Assignments of error (Printed Record p. 14) which are as follows:

ASSIGNMENTS OF ERROR.

1. The State Court erred in holding that the statute in question (Secs. 1818 et seq. Revised Code of North Dakota 1905) do not make an unwarranted delegation of Legislative power to the Board of County Drain Commissioners;

2. The State Court erred in holding that the levying of special assessments for local improvements is not controlled in its exercise by the same general principles as apply to the exercise of the power of taxation.

3. The State Court erred in holding that the exercise of the powers conferred upon the drainage board by the statute in question did not contravene that provision of the Fourteenth Amendment of the U. S. Constitution which forbids any State to deprive any person of his property without due process of law.

4. The State Court erred in holding that the facts stated in the complaint did not show that the acts of the defendants if permitted to proceed would not deprive plaintiffs of property without due process of law.

5. For the reasons aforesaid the judgment now before this Court for review is erroneous.

HISTORY OF THE LAW.

The present drainage law in question had its origin in an act passed by the State legislature in 1893. (Ch. 55 Laws of N. D. 1893). An outline of the provisions of that law will be found in the opinion of the State Supreme Court in Martin vs. Tyler, 4 N. D. 278, 282-288.

That law was declared unconstitutional in the above case, for the reasons, first, that the provisions for acquiring the right-of-way conflicted with the State Constitution which required compensation for the property condemned to be paid *before* the taking of it; second, that it required the County in which a drain was constructed to lend its credit for the cost of the work; in violation of the State Constitution, which prohibits the credit of a County to be pledged for works of internal improvement. Other constitutional objections were urged but overruled. No claim was made that the law violat-

of the "due process" clause of the State or Federal Constitutions.

The next legislature (that of 1895) passed a new Act retaining in the main the substance of the former invalid Act, making only such changes as were deemed necessary to obviate the constitutional objections pointed out by the Court in Martin vs. Tyler. This was Ch. 51 Laws of 1895. (Also found in N. D. Rev. Code 1895 Secs. 1444, et seq.) It was amended in unimportant particulars by Ch. 79 Laws of 1899. (The law as thus amended appears as Secs. 1444 et seq. in N. D. Rev. Code 1899.)

The changes made as a result of the decision in Martin vs. Tyler were to cut out the provisions relative to procedure for condemnation of right-of-way contained in the old law and substitute the provision authorizing the Board to resort to the Civil action provided by the North Dakota Code of Civil Procedure relating to eminent domain; (N. D. Rev. Codes 1895 and 1899, Secs. 5955 et seq. N. D. Rev. Codes 1905 Secs. 7574 et seq.); and to do away with the provisions of the old law which forced the County to pledge its credit for the cost of the drain.

Notice that by reason of the last mentioned change the hearing in District Court as to the *necessity* of the drain provided by the original law was done away with. As a result, the phraze referring to such a hearing still appearing in Section 5 (Rev. Code 1905 Sec. 1822) became meaningless.

It will also be noticed that under each of these laws, proceedings for the construction of a drain for improving agricultural lands (such as the one in question) could be initiated only on a petition signed by the proprietors of a *major portion of the land liable to assessment*. (Sec. 4 Laws of 1895; Rev. Codes 1895 and 1899 Sec. 1447).

In 1903 the legislature again amended the law by Ch. 80 laws 1903, so as to do away with the necessity for a petition from the proprietors of a majority of the land affected, and making the statute read as it now appears in Sec. 1821 Rev. Code 1905; which requires a petition from only six freeholders affected regardless of the extent of their holdings as compared with the aggregate area of the lands to be taxed. The law was again amended in unimportant particulars by Ch. 93 laws of 1907, as above indicated by italics.

The law, prior to the last mentioned amendment of 1903, was attacked on constitutional grounds including the question of "due process" in Erickson vs. Cass Co., 11 N. D. 494 and Turnquist vs. Drain Commissioners, 11 N. D. 514.

The State Supreme Court overruled the objections. As stated by the Court below in the case at bar, the objections now urged against the law as amended in 1903 have never been suggested to that Court until the presentation of them in this case.

INTERPRETATION OF THE STATUTE BY THE STATE COURT.

The law in question has been a prolific breeder of litigation; and consequently the State Court has been frequently required to construe its various provisions. The construction of it by the State Court is binding on the Federal Courts.

Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112.

Inasmuch as the determination of the question as to whether or not the Act conforms to the requirements of "due process" necessarily involves a consideration of its effect as construed by the State Court, we will call attention to certain features of the Act and the decisions of the State Courts construing and applying them, which are material in the present inquiry; before taking up the argument of the specific objections urged in support of our Assignments of Error.

It will be noticed that the legislature has only prescribed in a *general* way what conditions shall exist to justify the construction of a drain. The only limitations on the discretion of the Drain Commissioners are those found in Secs. 1818 1821 and 1822, Rev. Code 1905. By Sec. 1818 drains may be constructed "*Whenever the same shall be conducive to the public health, convenience or welfare.*"

By Section 1821 a petition is required to initiate action by the Commissioners.

"*If the leading purposes of the drain are benefits to the health, convenience or welfare of the people of any City or other municipality*", it is left to the judgment of the Commissioners how many signatures shall be required "*to satisfy the Board of Drainage Commissioners that there is a public demand for such drain.*"

If the chief purpose is drainage of agricultural lands it requires only six freeholders affected regardless of the extent of their holdings compared with the total area affected.

By Section 1822 the Commissioners may deny the petition if "*there was not sufficient cause for making such petition*" or if the probable cost of the drain will exceed the probable benefits.

All these important jurisdictional questions may be determined *ex parte* by the commissioners without notice or hearing.

Notice that Sec. 1821 as amended (Supra p. 56) provides that upon the presentation and filing of the petition the board shall personally examine the line of the purposed drain as soon as practicable, "*and if in its opinion it is necessary for the public good it shall enter a resolution to that effect, and shall also enter a resolution designating a competent surveyor.*"

And again in Sec. 1822 as amended (Supra p. 6-7) it provides that the board may grant or deny the petition "*the*

fore the survey has been made;" and thus may determine all the jurisdictional questions before the hearing upon the petition. Consequently the hearing upon the petition provided for by the amendment of 1907 as indicated by the italics at the end of Sec. 1821 (supra p. 6) does not take place until *after* the board has decided that the drain is necessary.

The act is so construed by the State Court as indicated by its opinion in this case; and it holds, following the dicta in previous decisions, that no hearing is required except on the apportionment.

It is left to the unlimited discretion of the Commissioners to determine for themselves according to their individual ideas what constitutes sufficient "benefit to the health, convenience and welfare" to justify a drain. The legislature has fixed no criteria to guide or limit the exercise of this discretion delegated to the Commissioners.

The only question in the proceedings as to which a hearing upon notice is required before a final decision of it, is for the review of the apportionment of the assessment. (Sec. 1824).

This, of course, is *after* the Board has established the drain and the only question remaining is that of *apportionment* of the cost amongst those liable to assessment.

In Erickson vs. Cass Co., 11 N. D. 494 the Court held (p. 507) that in the absence of fraud the determination of the Board as to assessments was final; that errors of judgment could not be reviewed or corrected.

In Turnquist vs. Board, 11 N. D. 514 (p. 518) this holding was re-affirmed; and it was also held that the fact that one of the Commissioners was a land-owner liable to assessment and participated in the decisions of the Board was immaterial.

In State ex rel vs. Fisk, 15 N. D. 219 it was again held that after the Board had acquired jurisdiction *all* its decisions were final and conclusive and could not be reviewed or questioned either directly or colaterally in the absence of fraud; that the fact that one of the Commissioners acting was personally interested was immaterial.

In Sim vs. Rosholt, 16 N. D. 77 it was held that the filing of a petition for a drain by six freeholders gave the Board jurisdiction and the drain could be established notwithstanding the petitioners had before the establishment withdrawn their names and remonstrated against the drain.

The particular features of the statute as thus construed to which we wish to call especial attention are these:

While the act provides for notice and hearing on the question of the *apportionment* of the cost amongst those benefited, *it requires no hearing or notice by the Board on the question as to the propriety of the drain and permits that question be decided before a hearing is had.*

The Act gives the Board uncontrolled power to decide without notice or hearing whether the conditions do or do not warrant the creation of a taxing district for the construction of the proposed drain; and without defining what those conditions shall be, makes the judgment of the Board final and conclusive on that question.

It is upon those features of the Act indicated by the above italized propositions that plaintiffs in error base their contention that the Act is a denial of "due process."

As indicated by the first assignment of error, we assert that the delegation of such uncontrolled power to such a body as the North Dakota Drainage Board cannot be rightfully made; and hence the exercise of such power by the Board will deprive plaintiffs of their property without due process of law.

In this connection let us distinguish between the act of equalizing or apportioning the burden of the tax or assessment according to relative benefits; and the act of deciding upon the propriety or necessity for constructing the drain.

It is very apparent from the opinion of the State Court in this case, that it failed to notice this vital distinction.

That distinction is this: The establishment of a local improvement such as a drain and the laying of the tax or assessment therefor are acts pertaining and belonging to the legislative department of the Government.

Spencer vs. Merchant, 125 U. S. 345.
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112.
Parsons vs. District, 170 U. S. 45.
Davidson vs. New Orleans, 96 U. S. 97.

The exercise of this legislative power, however, obviously involves in its exercise acts of an administrative and quasi-judicial nature. These administrative and quasi-judicial acts involved in the exercise of this legislative power, include the adoption of the plan for the work, the letting of contracts for construction and the equalization or apportionment of the burden of the cost amongst the lands or persons affected according to the relative benefits received, &c.

All these administrative or quasi-judicial powers which are necessary incidents to the exercise of the legislative power may be delegated to such officers or tribunals as the legislature may deem fit.

Spencer vs. Merchant, 125 U. S. 345 and other cases cited above.

The only limitation upon such delegation of power with

respect to acts of this character is that the officer or board or tribunal to whom such power is delegated must afford a hearing upon adequate notice to those affected.

Davidson vs. New Orleans, 96 U. S. 97.
Hager vs. Recl. Dist., 111 U. S. 711.
Wurtz vs. Hoaglund, 114 U. S. 606.
Spencer vs. Merchant, 125 U. S. 345.
Paulsen vs. Postland, 149 U. S. 30.
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112.
Parsons vs. Dist., 170 U. S. 45.

But as to those features of the legislative power to authorize or require a local improvement payable by tax or special assessment, which are *not* administrative or judicial in character, and which require the exercise of what may be termed *purely legislative judgment* different considerations apply. The duty and the right to exercise such purely legislative judgment is, in our form of government, exclusively entrusted to the legislative department and the legislature cannot rightfully surrender it to others or refuse to exercise that power itself. It cannot be delegated to any other officer, board or tribunal.

The only exception to the principle mentioned is that the full legislative power in this respect may be delegated to local representative bodies with respect to matters of local concern. This exception is one that is necessarily implied as necessary to local self government which is essential to our form of government.

I Cooley on Taxation (3d Ed.) pp. 95-101.
Bradshaw vs. Lankford, 73 Md. 428.
State vs. Armstrong, 3 Sneed (Tenn.) 654.
Inhabitants vs. Allen, 61 N. J. L. 228.

Nowhere has this principle been more fully recognized and firmly adhered to than in North Dakota.

State vs. Budge, 14 N. D. 532.
Vallely vs. Park Com., 16 N. D. 25.
Morton vs. Holes, 17 N. D. 154.

In re State vs. Budge the legislature created a Board of Commissioners to erect a Capitol building and a residence for the Governor; for which respective purposes Federal land grants had been made to the State. The legislature did not place any limitations on the Board as to the sums to be used for each of the two buildings. It was held that the discretion involved in determining how much of each of the funds available should be used for each of the respective buildings was a matter of purely legislative judgment, the exercise of which could not be delegated to any other body.

In Vallely vs. Park Commissioners, City Councils were empowered by the legislature to appoint a Board of Park Commissioners who were vested by the Act with power to lay out parks for the City and levy special assessments and general taxes for the creation and maintenance of such parks; their powers being similar in all respects with the drainage law in question here. The Act was held void because it was an unwarranted delegation of the taxing power. It was held that such power could only be delegated to a local representative body elected by the people to be taxed and directly answerable to them. They held and cited authorities to show that regardless of the prohibitions of the State Constitution such power could not be so delegated consistently with the principles of a republican form of government.

In Morton vs. Holes an Act was held void as an unwarranted delegation of purely legislative power, which authorized certain land owners to require township supervisors to make certain local improvements when petitioned so to do, the cost of the improvement to be paid for in part by special assessment and in part by general taxation. It was an unwarranted delegation of legislative power because it vested in certain individuals purely legislative discretion which could be rightfully delegated only to a local representative body directly answerable to all the people liable to be taxed.

In rendering these decisions the North Dakota Supreme Court was not merely construing and applying local law or provisions of the North Dakota Constitution. The decisions referred to above declared and applied those broad fundamental principles universally recognized as essential to the proper protection of individual rights under a Government such as ours. The North Dakota Court only recognized and applied the same principles which are universal and have been frequently announced and applied by other American Courts. It is an application of the Maxim that in a Republican form of government there can be no taxation without representation.

Cooley on Taxation (3d Ed.) pp. 95-101.
Bradshaw vs. Lankford, 73 Md. 428.
State vs. Armstrong, 3 Sneed, 654.
People vs. Hurlbut, 24 Mich. 44.

(See opinions of Judges Campbell and Cooley.)
People vs. Lothrop, 24 Mich. 235.
People vs. Council, 28 Mich. 228.
People vs. Council, 29 Mich. 108.
People vs. Mayor, 29 Mich. 343.
Schultes vs. Eberle, (Ala.) 2 So. 345.
State vs. Commissioners, 37 N. J. L. 12.
People vs. Parks, 58 Cal. 624.
Houghton vs. Austin, 47 Cal. 646.
Harward vs. Drain Co., 51 Ill. 130.
People vs. Mayor, 51 Ill. 17.
Hinz vs. People, 92 Ill. 406.
Wyandotte Co. vs. Abbott, 52 Kans. 148.
Wyandotte Co. vs. Com., 61 Fed. 436.
State vs. Mayor, 103 Iowa 76.
Barnes vs. Dyer, 56 Vt. 469.
Inhabitants vs. Allen, 61 N. J. L. 228.

We submit that the law in question plainly violates the principles above mentioned, and by reason thereof the proceedings under it are a denial of due process of law.

We concede that it was entirely permissible to create and empower this drainage Board to apportion and equalize the assessments amongst those benefitted; and to make the decision of the Board on these matters final, and non-reviewable. We also concede that the notice and hearing provided for this purpose would be sufficient were it not for the other features of the law to which we object.

This objectionable feature of the law is that it purports to vest in the Board of Drain Commissioners unlimited discretionary power of a purely legislative character, other than administrative or judicial; in flagrant violation of the principles above set forth.

As hereinbefore pointed out (Supra pp. 20-24) the Act in its present form, since the amendment of 1903, empowers the Board to decide finally and conclusively whether or not a drain shall be established. That question is conclusively determined *ex parte* by the Board without any hearing or notice.

Moreover the Legislature has not in the Act defined what conditions shall exist to warrant or require the construction of a drain and has not prescribed any criteria by which to determine whether or not the construction of a drain is justified or necessary.

In short, this Act vests precisely the same discretionary

power in the drainage Commissioners in determining whether a drain ought to be constructed as the legislature itself possesses; and the Board is permitted to exercise that discretionary judgment in the same way and to the same extent as the legislature itself, and the Board's decision is given precisely the same conclusive effect that the decision of the same question by the legislature itself would have.

We believe the foregoing is a fair statement. The statute provides in Secs. 1821 and 1822 that the Drain Commissioners may establish a drain when its chief object is to drain agricultural land if in the judgment of the Commissioners the estimated benefits exceed the estimated cost.

The provision in Section 1818 to the effect that drains may be constructed "whenever the same shall be conducive to the public health, convenience or welfare" is doubtless also applicable to an agricultural drain as well as to one exclusively for the benefit of a City or municipality.

So taking all three sections together the statute empowers the Board to lay an agricultural drain on the petition of six freeholders whenever in the judgment of the Board the probable benefits of the drain will exceed its probable cost and in the judgment of the Board it will be conducive to the public health, convenience and welfare.

These general conditions are the implied limitations on the right of the legislature itself to exercise such power and in fact the only limitations. The leglislature can lay such a tax only when the undertaking is conducive to the public health, convenience or welfare. If it is not conducive to those purposes the legislature has no right to undertake it.

So also the legislature cannot levy a special assessment unless the probable benefit equals or exceeds the probable cost.

Williams vs. Eggleston, 170 U. S. 304, 311.
Parsons vs. Dist. 170 U. S. 45.
Norwood vs. Baker, 172 U. S. 269.
Schafer vs. Werling, 188 U. S. 516.
Walsh vs. Barron, 61 Ohio St. 15.
State vs. Newark, 37 N. J. L. 415.

So it is plain that the statute purports to delegate to the drainage Board precisely the same power and all the power that the legislature has with respect to drainage without any limitations other than those general ones which the legislature itself is bound to observe.

As hereinbefore stated, we concede that it was entirely

proper to vest this Board with the power to make the plans, let the contracts for construction, to estimate the cost and apportion and equalize the burden of cost in the form of assessments; and on these matters it was competent to make the Board's action final.

This is so because these acts, while within the scope of legislative power, are administrative and quasi judicial in nature and may, therefore, be delegated to whomsoever the legislature sees fit, subject only to the requirements as to notice and hearing which will be hereafter referred to.

Spencer vs. Merchant, 125 U. S. 345.
Fallbrook, etc. vs. Bradley, 164 U. S. 112.
Inhabitants vs. Allen, 61 N. J. L. 228 and other authorities cited Supra.

Probably also the power to determine whether or not the benefits will exceed the cost may also be thus delegated in like manner. At least we shall assume throughout this argument that it may be so delegated.

But the establishment of a drain involves, in addition to the foregoing acts, the determination of the *expediency* of the undertaking—the inquiry as to whether or not the drain is sufficiently conducive to the health, welfare or convenience of the people affected to warrant or require it. This is peculiarly a question for the decision of a legislative body; and under our form of government is required and permitted to be exercised only by an appropriate body representative of and answerable to the community in which it exercises its jurisdiction. The fact that such power can be exercised only by such a body is the only safe-guard and protection which the citizen has against the abuse of the power. And it is because of that fact that none but the appropriate representative body can be permitted to exercise such power without denying to the person affected the only protection which the law of the land affords him in such cases.

It was said by Chief Justice Marshall in McCulloch vs. Maryland, 4 Wheat. 316: (p. 428) "*The only security against the abuse of this power (taxation) is found in the structure of the Government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of the State, therefore, give to their government a right of taxing themselves, and their property, and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of the right, resting confidently on the interest*

of the legislator, and on the influence of the constituents over their representatives to guard them against abuse."

So in Schultes vs. Eberle (Ala.) 2 So. 345 at p. 348 in speaking of a statute which delegated the taxing power to an appointive board, the court said:

"The cardinal principle of self-taxation has been ignored. It has no features in harmony with our system of republican government. However earnest may be the interest in popular education—we cannot afford, in order to accomplish an end so benevolent and beneficial, to break down the constitutional safeguards of property which the sovereign people have ordained for their protection. Such legislation, first induced by a patriotic desire to secure the great desideratum of popular education, calculated to lull vigilance, may become misgovernment subversive of the fundamental and distinguishing principles of republican institutions."

So also in Vallely vs. Park Com. 16 N. D. 25 dealing with a statute similar to the one in the case at bar, Chief Justice Morgan said (pp. 32-33):

*"It has become a well recognized principle of constitutional law that local boards and councils elected by the people are bodies to which the power to tax may be delegated. * * * The power of the legislature to delegate the authority to levy taxes is generally held to be limited to boards or councils elected by the people, and is not sanctioned when delegated to those appointed, when the appointment has not been assented to by a vote of the people. * * *The power to levy taxes is one of the most important legislative functions. If abused it may amount to a practical confiscation of property. A power so far-reaching should not be reposed in any one not directly responsible to the people. * * * Regardless of Sec. 130 of the Constitution the delegation of the taxing power to a person or board without some assent by the people could not be sustained."*

See also cases cited above, several of which are quoted in Vallely vs. Park Com.

The only protection which the "Law of the land" affords a citizen against the abuse of the legislative power is that it can be exercised only by a representative body. With respect to the power of taxation this protection in effect only extends as to so much of the legislative power as we have termed *"purely legislative judgment"* as distinguished from those incidents of the power which are of administrative or judicial nature. By the Act in question, the legislature has delegated all of its power—those which are purely discretionary as well as those which are administrative and judicial—to a non-representative body of men in whose selection the community affected by their acts have no voice, and who are not answerable to that community for their acts.

The Act deprives those affected by the proceedings of

the Drain Commissioners of the only protection which the law of the land affords against the oppressive exercise of such power.

We submit, therefore, that the proceedings in question are proceedings which will deprive the plaintiffs in error of their property without due process of law.

The North Dakota Supreme Court in the decision under review in effect holds that the principles above discussed apply only to inhibit the delegation of legislative power with respect to *general* taxation; and do not apply to the levying of special assessments for local improvements. It is on that ground that the Court below seeks to differentiate the case at bar from the case of Vallely vs. Park Commissioners in which it emphatically announced and applied the legal principles above discussed. A comparison of the drainage law with the park law involved in the Vallely case will show that the differentiation made by the Court below is inadmissible. The Park Law is found in Ch. 143 N. D. Laws of 1905, and is embodied in North Dakota Revised Codes of 1905, Secs. 3017, et seq.

The Park Commissioners were appointed by the City Council—the governing body of the City. (N. D. Rev. Code 1905, Sec. 3020.) The Drainage Commissioners were appointed by the Board of County Commissioners—the governing body of the County. (N. D. Rev. Code 1905, Sec. 1819.)

The Park Commissioners were authorized to lay out parks and pay for them by levying special assessments, or general taxes, or both. (N. D. Rev. Code 1905, Sec. 3021 subd. 2, 4 and 7.) So also the Drainage Commissioners have the same unlimited discretion to establish drains any place in the County and pay for them by levying special assessments or general taxation, or both. (N. D. Rev. Code Sec. 1821, 1826.)

In the instant case the defendant board has required part of the cost of the drain in question to be paid for by general taxation in the Townships of Mayville and Morgan. (Printed Record pp. 2-3.) The plaintiffs as taxpayers in those townships are required to contribute to the cost of the drain in the form of general taxes as well as in the form of special assessments.

The only difference between the powers of the Park Board and the Drainage Board with respect to levying general and special taxes is that the Park Board could exercise its powers in a single City and two miles on each side of it, while the power of the Drainage Board extends throughout the entire County.

We submit, therefore, that there is no true ground for the distinction sought to be made between the powers of the Park Board involved in the Vallely case and those of the Drainage Board. If the principles applied by the Court in

the Vallely case are sound and properly applied, they must be applied in the case at bar.

We are unable to understand how the Court below could conclude and assert that the Drainage Board has no powers of general taxation, in face of the fact that the statute explicitly grants that power, and in face of the admitted fact in the record that the defendant Board has actually imposed a general tax on each of the two townships traversed by the drain. If the statute is good, plaintiffs in error will not only have to pay the special assessments levied upon them; but also, in common with the other taxpayers of the townships of Mayville and Morgan, will have to pay the *general* taxes imposed for the cost of the drain.

It is true that the Drainage statute does not in words style this charge made by the Drain Commissioners against a township or other municipality the levying of a general tax. But it is apparent that it is such in fact.

The Drainage Board decides how much the municipality shall contribute to the cost of the drain. (Rev. Code 1905 Sec. 1826). When the Drainage Board has fixed the amount the municipal officers are required to include the sum so fixed in the general tax levy. (Rev. Code Sec. 1831). In short the Municipal and County officers are merely the ministerial agents to execute and record the will of the drainage board, with respect to the sum which the Municipality shall collect and pay by means of general taxation.

In Lovingstone vs. Wider, 53 Ill. 302, a similar statutory provision was discussed. The Court said in that case at p. 305:

"It is said by counsel for appellees that the Act in question is not open to this objection, because it does not give to the police commissioners the right to impose a direct tax. But it does the same thing in substance. It authorizes them to issue certificates of indebtedness which are made receivable in payment of all taxes and debts due the City, and by the amended Act of 1869 are convertible into City bonds on demand of the holder. In this respect, also, the case is like People vs. Mayor (51 Ill. 17) where we held that the power to impose a tax and create a debt to be discharged by the levy of a tax were substantially the same thing."

But even if it were true that the drainage statute only authorized special assessments and not general taxes, the holding of the Court below to the effect that the principles announced in the Vallely case do not apply to the case at bar it clearly erroneous.

There is no warrant either in principle or precedent for the holding of the Court below to the effect that the principle which forbids the delegation of purely legislative power is applicable only to the power to levy *general* taxes.

The principle is that purely legislative power cannot be

delegated; and this is just as true of the police power or any other form of legislative power as it is of the power of taxation.

In State vs. Budge, 14 N. D. 532, the North Dakota Supreme Court applied the principle to the Capitol Commission law, which in no way involved any form of taxation or assessment.

The following are instances of its application by other Courts to attempted delegations of powers other than the taxing power.

Bradshaw vs. Lankford, 73 Md. 428.
Ry. Co. vs. Todd, 91 Ky. 175.
Dowling vs. Lancashire, 92 Wis. 63.
Ry. Co. vs. Commonwealth, 99 Ky. 132.
Schaezlein vs. Cabaniss, 135 Cal. 466.
Barto vs. Himrod, 8 N. Y. 483.
State vs. Simons, 32 Minn. 540.

It is wholly immaterial whether the levying of special assessments is classified as the taxing power or the police power or some other kind of power. It is in any case a legislative power and to the extent that its exercise requires purely legislative discretion it cannot be delegated.

It is, however, thoroughly settled that special assessments for local improvements are an exercise of the taxing power.

Judge Cooley speaking of special assessments says:

"That these assessments are an exercise of the taxing power has over and over again been affirmed until the controversy must be regarded as settled."

Cooley on Taxation (3d Ed.) p. 1181.

In Hamilton on Special Assessments (published in 1907) the author says on this subject:

"However, it is now settled in the Federal Courts, and in the Courts of last resort of practically every State of the Union, which recognizes the power of special assessment except Colorado, that all such assessments are laid under the taxing power."

Hamilton on Special Assessments p. 38 Sec. 49.

See also

Desty on Taxation p. 1117, 1265-1266.
2 Dillon Mun. Corp. (4th Ed.) Sec. 752.
Cooley on Const. Lim. pp. 213-216.
Burroughs on Taxation, p. 458-463.
25 Am. & Eng. Encycl. of Law (2d Ed.) p. 458-468.

The point has been thoroughly settled by the numerous decisions of the United States Supreme Court cited in this brief relating to special assessments.

The reasons wliich forbid the delegation of the legislative power to tax are just as cogent with respect to special assessments as they are with respect to general taxation.

Special assessments, like general taxes, appropriate for the public good the property of the people taxed. The power to levy taxes in the form of special assessments is just as liable to abuse as the power to levy general taxes. Indeed, the opportunity for abuse is greater in special assessments than in general taxation. Special assessments, especially when levied according to an estimate of relative benefits, afford the utmost opportunity for favoritism and unfairness. Moreover they affect only a limited number of the people in a community; and do not receive that publicity or arouse that widespread general interest that attends the proceedings for laying general taxes. The grievances of the few affected by a special assessment are not so likely to arouse a general hue and cry and have that deterrent effect upon the taxing officers which would surely result from any corrupt or unfair practices in laying a general tax upon a whole community. Then too the sums imposed as special assessments are as a rule much greater and impose a far heavier burden on those who have to pay them than the comparatively small amount which falls to the share of each individual as general taxes.

If the strict observance of the principles which forbid the delegation of purely legislative power is so necessary as the only safeguard against abuse of the power to levy *general* taxes, how much more important is it that it should be rigidly enforced as the only protection against the infinitely greater opportunity for fraud and oppression in the levying of taxes in the form of special assessments!

We believe that the erroneous conclusion announced in the decision of the Court below is due primarily to two specific errors; aside from the fundamental error, above discussed, of holding that the prohibition against delegating legislative power did not extend to special assessments. Those two specific errors are these:

First: In assuming that the decisions of that Court upholding the constitutionality of the drainage law prior to the amendment of 1903, were precedents which were controlling on the Court in the case at bar; the Court failing to notice the radical change in the law effected by the 1903 amendment.

Second: In assuming that the provision in this law for notice and hearing of the apportionment and equalization of the assessments were a sufficient compliance with the requirements of "due process."

We shall discuss the last mentioned error first.

The provision in this Act for notice and hearing is not

sufficient to make the proceedings comply with the requirements of "due process."

Under the provisions of this law the presentation of a petition from six freeholders gives the Board jurisdiction to proceed. (Rev. Code Sec. 1821 supra p. 5-6.)

Erickson vs. Cass Co., 11 N. D. 494.
Turnquist vs. Board, 11 N. D. 514.
State ex rel vs. Fisk, 15 N. D. 219.

The next step is the examination of the route of the proposed drain. The board may employ a civil engineer to make surveys, maps, plans, estimates, etc., to aid it in its work. (Rev. Code 1905 Sec. 1821, 1822, supra pp. 5-7).

As a result of this examination the Board makes its decision on the advisability of constructing the drain—decides whether or not in its opinion the drain will be "Conducive to public health, welfare or convenience; and whether or not the benefit will exceed the cost." All this takes place without notice to any one affected and the decision reached on this *ex parte* proceeding is final and conclusive and in no way subject to review either by the Board itself or any other tribunal. If the Board on this *ex parte* investigation decides to build the drain, that decision stands throughout all subsequent proceedings, either before the Board or otherwise, as a conclusive adjudication that the drain will be conducive to the public health, welfare or convenience and that the benefits derived will exceed the cost of construction; and consequently that the drain ought to be and will be constructed.

Now, even if it be assumed (although we think such assumption is inadmissible) that the final decision of such purely legislative questions can be lawfully delegated to such an appointive administrative body as the drainage board, the insuperable objection to this statute remains that it empowers the drainage board to make this final decision without any notice to or hearing of the parties affected.

We believe it is firmly settled that when the legislature delegates any of its powers with respect to local improvements to an administrative officer or board, other than a local representative body, the decisions of such officer or board cannot be made final without a hearing in some form upon notice, affording the persons affected the right to question the propriety of the decision.

This was squarely decided in Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 173. In that decision on page 174, in connection with the question of notice and hearing, Justice Peckham says (p. 174):

"It has been held in this Court that the legislature has power to fix such a district [taxing District] *for itself without any hearing as to benefits, for the purpose of assessing upon the lands within the district the cost of a local public improvement. The legislature when it fixes the district itself, is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the District, and the citizen has no constitutional right to any further hearing upon that question.*

*But when, as in this case, the determination of the question of what lands shall be included in the district is only to be decided after a decision as to what lands described in the petition will be benefitted, and the decision of that question is submitted to some tribunal * * * the parties whose lands are thus included * * * are entitled to a hearing upon the question of benefits.*

Unless the legislature decide the question of benefits itself, the land owner has the right to be heard upon that question before his property can be taken."

Such also is the doctrine established directly or indirectly by the following cases:

Spencer vs. Merchant, 125 U. S. 345.
Walston vs. Nevin, 128 U. S. 578.
Parsons vs. District, 170 U. S. 45.

In the above case at p. 52 the Court says:

"Where the legislature has submitted these questions for inquiry to a commission or to official persons to be appointed under municipal ordinances or regulations the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice or an opportunity to be heard."

As stated above the decision of the board as to the *expediency* of the drain and that its benefits will exceed its cost is made and becomes final and conclusive, before any notice is given or hearing had on the apportionment or equalization of the assessment amongst those to be assessed.

The necessary result, therefore, is that the hearing upon notice provided by the Act is a mere "Will o' the Wisp." It is in form a hearing but is nothing but a form. It is like giving a formal hearing after the tribunal has decided the matter to be heard.

It is apparent that a hearing is of no avail if the question to be heard has already been decided.

Under this law the position in which the persons assess-

ed are placed at the hearing provided is this: The person assessed objects and offers to prove that the drain will not be conducive to the health, welfare or convenience of the community affected. The board must overrule his objections on those points because they have already finally decided those questions before the hearing. So also the person assessed may object and offer to prove that the cost of the drain will exceed the benefits thereof. Again he will be met by the answer that inquiry into that question has been foreclosed by the decision of the Board before the hearing that the benefits will exceed the cost.

So the only point open to inquiry is whether or not the amount assessed against the party seeking a hearing has been fairly *apportioned*. As a basis for this hearing it must be conclusively assumed that the drain ought to be constructed and that the benefits of it will exceed the cost. The only question open to discussion is whether the party being heard will receive *any* benefit and what ratio his probable benefit bears to the total cost of the enterprise, or how much his benefit will be in comparison with others who are benefitted.

Clearly this is no hearing on the jurisdictional question of whether or not the Board had any right to impose any tax at all.

So even if it be assumed that such a Board could be lawfully empowered to finally decide after a hearing upon notice the purely legislative question as to whether or not the drain should be constructed, the statute in question does not provide for such a hearing as "due process" requires.

BUT PLAINTIFFS IN ERROR CONTEND THAT SUCH A BODY AS THE DRAINAGE BOARD IS BY THE "LAW OF THE LAND" INCOMPETENT TO FINALLY DECIDE SUCH A PURELY LEGISLATIVE QUESTION AS THAT OF THE PROPRIETY AND EXPEDIENCY OF A PROPOSED DRAIN EVEN AFTER A HEARING UPON NOTICE.

This is so because the statute has not prescribed any criteria or test by which to determine when a proposed drain will be "conducive to the health, welfare or convenience" of any community or locality. It is left to the undirected judgment of the drainage board to determine what is or is not conducive to the health, welfare or convenience. The decision of such a question requires purely *legislative* judgment and none but a legislative body can rightfully decide it. And this is true, whether a hearing is afforded or not. Indeed on such questions no hearing is necessary because it can only be decided by a legislative body, and such bodies are not required by the "Law of the land" to proceed upon notice and hearing.

It is only when the power to decide questions is delegated to an administrative officer or board that a hearing upon notice is required.

Spencer vs. Merchant, 125 U. S. 345.
Fallbrook vs. Irr. Dist. 164 U. S. 112 and other Federal Cases, supra.

Keeping in mind that, as hereinbefore shown, it is only those powers which are administrative or quasi-judicial that can be so delegated to such body it is entirely proper to say, as many of the decisions do say, that when the legislature creates such a Board to make a local improvement and lay the tax or assessment therefor, the citizen is entitled to a hearing only as to the questions of fact involved in determining the benefits and the apportionment of the tax or assessments amongst those who receive those benefits.

This is so because the decision of one or both of those questions are the only questions which such a Board can be given jurisdiction to finally decide. It presupposes that the *purely legislative judgment* involved in determining whether or not an improvement shall be made to be paid for by local or general taxation has been exercised by some competent body other than such a Board—that is, either the legislature itself or some local representative body to which purely legislative power as to local matters may be properly delegated in accordance with the "Law of the land."

A perusal of the cases sustaining statutes providing for taxation or assessment for local improvements will disclose that they all reserve to some competent representative body the decision of the question as to whether a local improvement shall or shall not be constructed; so that only powers of an administrative or judicial nature are delegated to the officer or board created to execute the work.

The modes of accomplishing this result are almost as numerous as the statutes by which it is done; but it will be found that the plan adopted is one or the other or combinations of two or more of the following general methods:

1. By special act wherein the legislature itself directly orders a specified local improvement, prescribes the plan, and other details, and decides who shall be taxed and either makes the apportionment itself or creates a tribunal for that purpose before whom a hearing is provided.

The following cases present examples of this plan:
Spencer vs. Merchant, 125 U. S. 345.
Davidson vs. New Orleans, 96 U. S. 97.
Williams vs. Eggleston, 170 U. S. 304.
Lent vs. Tillson, 140 U. S. 316.

This method, however, is not permissible in North Dakota because of the inhibitions of the State Constitution on special legislation.

N. D. Const. Sec. 69.

2. By delegating to the representative governing body of a city or other municipality the same unlimited general power as the legislature itself possesses with respect to such local improvements, but confining the exercise of the power to the City or other municipality to which the local body belongs.

The following are examples of this method:

Paulson vs. Portland, 149 U. S. 30.
Holt vs. City, 127 Mass. 408.
Maddux vs. City, (Ky.) 14 S. W. 957.
Davis vs. City (Va.) 6 S. E. 230.
Walston vs. Nevin, 128 U. S. 578.
Ruggles vs. Collier, 43 Mo. 353.
People vs. Pitt, 169 N. Y. 521.

This method is permissible because the "Law of the land" as heretofore shown (supra pp. 22-23) permits the delegation of even purely legislative power with respect to local affairs to such local representative governing bodies.

3. By granting to a local representative governing body such as a City Council, the trustees of a village, the supervisors of a township, or the County Commissioners of a County, the power to order local improvements and levy general or special taxes therefor within the localities over which their respective jurisdictions extend; but prescribing in more or less detail the conditions precedent to the right to make the improvement; and leaving it to the local body to decide whether the prescribed conditions exist.

The following cases present examples of such law:

Voight vs. Detroit, 184 U. S. 115.
French vs. Aspalt Co., 181 U. S. 324.
Dodge Co. vs. Acorn (Neb.) 85 N. W. 292.
Webster vs. Fargo, (N. D.) 181 U. S. 394.

Such laws are sustainable by the "Law of the land" because the legislature itself has declared the conditions which shall be deemed to justify or necessitate any given improvement and may properly delegate to a local representative body in the locality affected the power to decide whether or not the prescribed conditions exist. And this even though the decision of it involves to a greater or less extent purely legislative judgment; because such bodies are by the "Law of the land" proper recipients of such delegated legislative power in matters of local concern.

4. By providing for a procedure for the making of local improvements on the petition or vote of a majority of those to be taxed therefor. By this method the question of the necessity for the work is in effect submitted directly to the persons to be taxed which is obviously proper under the "Law of the land." The usual course is to require a petition signed by a major portion of those to be taxed addressed to some officer or board who are thereby authorized to put the taxing power in operation. Sometimes, instead of requiring the assent of the majority of those to be affected to be evidenced in the first instance by a petition, a notice is provided for to all persons affected; and if a majority do not dissent within a given time, that fact is made conclusive evidence of assent. Sometimes also the question is submitted to a vote of the people affected. Whichever form is pursued under this plan it is in effect a method by which the people directly affected are empowered to decide for themselves whether or not the proposed improvement shall be made; thereby directly deciding for themselves the purely legislative questions involved in such a proposition.

As examples of this method the following cases may be cited:

Hager vs. Reclam. Dist. 111 U. S. 711.
Wurtz vs. Hoagland, 114 U. S. 606.
Fallbrook Irr. Dist. vs. Bradley, 164 U. S. 112.
In re Banta, 60 N. Y. 165.
Dennison vs. City (Mo.) 8 S. W. 429.
Town vs. Nelson, 35 Ind. 532.
Gorry vs. Gaynor, 22 Ohio St. 584.

This was the plan of the North Dakota Drainage Law prior to the amendment of 1903; a subject which will be discussed later in this brief.

5. By prescribing specifically what conditions shall exist to necessitate the construction of a given improvement,

and prescribing the rules to govern the laying and apportionment of the tax therefor; and designating some officer or board to execute the law; whose decisions are all subject to review at some stage of the proceedings in some appropriate form either before a Court or before the local representative governing body. Under this method the legislature itself exercises the purely legislative judgment of determining the necessity for the work, by prescribing definite criteria which in its judgment are indicative of such necessity. It then becomes merely a question of fact whether the prescribed conditions exist or not with respect to any proposed improvement; and the citizen is afforded the right to a hearing before an appropriate tribunal on this question before any decision of that question by the administrative officer or board becomes final. The appropriate tribunal in which the hearing on that question may be had is either the ordinary judicial tribunal where the usual judicial procedure is observed; or a local representative governing body having jurisdiction over the territory affected, such as the City Council in a City, the Supervisors of a Township, or the Commissioners of a County. The latter kind of tribunal is an appropriate one, because under the "Law of the land" such local governing bodies may properly be empowered to decide such questions.

The following cases present examples of this method:
Rogers vs. St. Paul, 22 Minn. 494.
State vs. Board, (Minn.) 92 N. W. 216.
Village vs. Spencer, (Ill.) 8 N. E. 846.
Blake vs. People, 109 Ill. 504

We believe that we are safe in asserting that in every case where a statute providing for taxation for local improvements has been sustained against attack it will be found that the procedure followed was one of the five methods above enumerated or a combination of two or more of those methods. Thus it will be seen that the power to finally decide on the question of the necessity for exercising the taxing power for local improvements has never been sucessfully delegated to any other than a local representative body; and only the incidental administrative or judicial questions involved in the exercise of the legislative taxing power have ever been left to the final decision of any administrative officer or board.

This of itself is persuasive evidence that such a radical

departure from all customary procedure as is shown by the statute in question is not sanctioned by the "Law of the land."

This idea is well expressed by Judge Cooley as follows:

"*When property is appropriated by the Government to public uses, * * * we have only to see whether the interference can be justified by the established rules applicable to the special case.*

Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and render safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

It would be manifestly impracticable to refer to all the adjudicated cases to prove the assertions we make that all those cases in which special taxes for local improvements have been sustained fall within one or more of the five classes above enumerated.

We believe, however, that the cases which have been before the United States Supreme Court are fairly representative of the general mass of such cases before the State Courts throughout the Country. We shall, therefore, refer as briefly as may be to those cases to support our assertions.

DAVIDSON VS. NEW ORLEANS, 96 U. S. 97:

In this case the Louisiana legislature had itself by special act ordered the work done, fixed the price and let the contract. The *apportionment* of the assessment amongst the lands benefitted was subject to judicial inquiry on due notice before one of the ordinary Courts of the State. The procedure, therefore, was a combination of the first and fifth classes above enumerated.

HAGAR VS. RECLAMATION DISTRICT, 111 U. S. 701:

In this case the drain was ordered to be constructed and the taxing district was established by the County Supervisors (the local representative governing body) on the petition of a majority of those affected; under conditions prescribed by the statute. The assessments, and all other questions involved, were subject to review, revision and annulment before the proper Court in the action by which the assessments had to be enforced.

This was in the main the method described in our fourth classification above, combined with some features of the fifth classification.

In this connection it is worthy to note that a previous drainage law of California was held invalid by the same State Court which sustained the subsequent law involved in Hagar vs. Reclamation District. The prior law was declared invalid for the reason, among others, that it delegated purely legislative power to an administrative board, and, therefore, was not "due process". The case referred to is People vs.

Parks, 58 Cal. 624. Special attention is invited to pp. 642-643; the language there used is so strikingly applicable to the case at bar that we shall quote it:

"*The entire subject, including the necessity for drainage of any particular section of the State, and the creation and organization of drainage districts was, therefore, referred, by the Act, to the Board of Commissioners, with power to legislate, and for that purpose an almost unlimited discretion was given to them.* * * * *I think that the determination of those things could not be referred to a Board of Commissioners or other body.* * * * *These are powers conferred upon it* [the legislature] *by the Constitution and it cannot delegate them to any other department of the government, or to any agency of its appointment, because it would be confiding to others that legislative discretion which legislators are bound to exercise themselves, and which they cannot delegate to any other man or men to be exercised.*"

The Supreme Court of California had previously applied the same principles to declare invalid a law delegating the power to levy general taxes.

Houghton vs. Austin, 47 Cal. 646.

The same Court sustained the law involved in Hagar vs. Reclamation District against the same constitutional objection.

Hagar vs. Yolo Co., 47 Cal. 222.

WURTZ VS. HOAGLAND, 114 U. S. 606:

In this case, the statute permitted the proceeding to be initiated by a petition of five or more land owners, addressed to an administrative board; which was required to propose a plan of drainage of the District affected. Notice was given and if a majority affected by the proposed drain objected within a given time the project had to be abandoned. Thus it was left directly to the people affected to decide on the necessity for the project.

If the people affected consented by not objecting, then the work proceeded, hearings on all questions involved as to plans, cost, apportionment of the tax, etc., being provided for on adequate notice before a judicial tribunal.

This method is the same as that involved in Hagar vs. Reclamation District, 111 U. S. 701; being a combination of the fourth and fifth classes above mentioned.

The laws and decisions of New Jersey in which Wurtz vs. Hoagland arose, furnish numerous examples of the taxing power exercised for local improvements. But in all such cases in that State which we have found where the procedure was sustained the law carefully reserved the decision of purely legislative questions to a legislative body. Many of the illustrative New Jersey cases are cited in Wurtz vs. Hoagland.

In New Jersey, as in California, the State Court held in-

valid a drainage statute because it delegated purely legislative power to an administrative board.

State vs. Commissioners 37 N. J. L. (8 Vroom) 12.

Speaking of the Act there involved Chief Justice Beasley said (p. 13):

"It is illegalized from the presence in it of a delegation to this official body [an administrative board] *of powers which can be exercised by the legislature alone, and which are not, in their nature transferable to any other branch of the government or its agents."*

So also in State vs. Terhune, 41 N. J. L. (12 Vroom) 90, the Court recognized that the delegation of purely legislative discretion to an administrative board would be a fatal objection to such a law.

SPENCER VS. MERCHANT, 125 U. S. 345:

In this case, the New York Legislature, by special act, directly decided the necessity for the work, the lands to be taxed and the amount of the aggregate tax, leaving only the apportionment of the assessment amongst the persons to be taxed, to an administrative board; whose decisions were subject to review in Court.

This statute followed the method described in our first classification above. The provision for review of the apportionment by a Court or other tribunal was not of course essential to "due process." A hearing before the apportioning officer or board upon notice would have been a sufficient compliance with the "Law of the land."

LENT VS. TILLSON, 140 U. S. 316:

In this case, the California Legislature by special act authorized a street to be improved, and specifically designated the property to be taxed therefor. It delegated to the Board of Supervisors [the local representative body] the duty to decide whether the work thus specifically authorized by the legislature should be undertaken or not. The apportionment of the tax amongst the lands within the district defined by the legislature was to be made according to benefits and was subject to review both before the Supervisors and the Court.

This was a combination of the methods described above in our first and second classifications; and to some extent the fifth.

The decision of the State Court is reported as Lent vs. Tillson, 72 Cal. 404. That Court in its decision pointed out that the purely legislative discretion involved in the proceeding so far as not exercised by the legislature itself was delegated to the local representative body; to which such power may properly be delegated; and only administrative functions were vested in the administrative board created to execute the work.

PAULSEN VS. PORTLAND, 149 U. S. 37:

In this case, the legislature of Oregon had delegated in general terms to the City Council the power to construct local improvements in the City, and levy taxes therefor. The Council ordered a sewer constructed designating the manner and form of levying the tax and the property subject thereto. Officers were designated to execute the work and apportion the tax, whose decisions were reviewable before the Council.

This is the method described in our second classification above.

In this case Justice Brewer said (p. 38):

"*The City is a miniature State the Council is its legislature, the Charter its Constitution.*"

King vs. Portland, 184 U. S. 61 involved substantially the same law.

FALLBROK VS. IRRIGATION DISTRICT, 164 U. S. 167:

This case involved a law substantially the same as that involved in Hagar vs. Reclamation Dist. 114 U. S. 701.

The statute prescribed the conditions which should be deemed to justify a drain. The proceedings could be initiated only on the petition of the owners of a major portion of the land liable to be taxed. The petition had to be approved by the Board of County Supervisors; and finally the proposition had to be approved by the majority vote of the electors of the territory affected. Following the construction of the State Court it was held that the Board of Supervisors [a local representative body] had the power and duty to exercise purely legislative discretion so far as any such had been delegated by the act; and hence was not vulnerable to the objection that it improperly delegated purely legislative discretion. It overruled the construction placed upon it by the Federal Circuit Court, which held that the Board of Supervisors had no right to exercise its judgment as to the propriety of the enterprise; and hence there was an improper delegation of legislative power.

Bradley vs. Irrigation Dist. 68 Fed. 948.

WALSTON VS. NEVIN, 128 U. S. 578:

In this case, the Kentucky statute delegated the entire legislative power with few general limitations upon the City Councils to levy general and special taxes for local improvements.

This method comes under our second classification above.

WILLIAMS VS. EGGLESTON, 170 U. S. 308:

Here the Connecticut legislature by special act directly ordered the tax and prescribed the rule to ascertain its amount and made the apportionment itself amongst the towns affected.

It is an example of the method in our first classification.

PARSONS VS. DIST. OF COLUMBIA, 171 U. S. 50:

Here Congress itself declared the necessity, fixed the price of the work, the property to be taxed and the apportionment of the tax; leaving only the duty to decide when the work was to be undertaken to the judgment of the Commissioners; who under the peculiar situation of the District of Columbia are in a limited sense its governing body.

It was an adoption of the method mentioned in our first classification.

Baumann vs. Ross, 167 U. S. 553 involved substantially the same method except that it applied to some extent some of the features of the other methods mentioned in the above classifications.

FRENCH VS. ASPHALT CO., 181 U. S. 324:

This case and its companion cases involved the validity of the "front foot" or similar rules for apportionment of assessments. They involve no question material to the case at bar.

VOIGHT VS. DETROIT, 184 U. S. 115:

The same questions are also involved in

Goodrich vs. Detroit, 184 U. S. 432.

These cases present examples of the method described in our third classification above.

By general law the Michigan legislature prescribed the general conditions under which local improvements could be made, and taxes and assessments levied therefor and provided the general form of procedure, but delegated to and required the local representative governing body — City Council, County Supervisor or Town Trustees, etc.,—to determine the necessity and propriety of the work and the tax. The decisions of the State Court in the above cases will be found in Voight vs. Detroit, 123 Mich. 547, and Goodrich vs. Detroit, 123 Mich. 559.

The history of the legislation and resulting litigation in Michigan relating chiefly to local improvements in the City of Detroit is very instructive on the questions involved in the case at bar. It was a long struggle by the people of that City to maintain for their own protection against the repeated attempts of the State legislature to disregard that feature of the "Law of the land" which the plaintiffs in error in the case at bar are invoking, namely, that in the matter of taxation or assessment for local improvements, purely legislative discretion cannot be delegated to any other than a local representative body.

The struggle is disclosed by the following cases:

People vs. Hurlbut, 24 Mich. 44.

People vs. Lothrop, 24 Mich. 235.

People vs. Common Council, 28 Mich. 228.

People vs. Common Council, 29 Mich. 108.

People vs. Mayor, 29 Mich. 343.

By an act of the legislature in 1871 a Board of Public Works consisting of designated persons was created and vested with control of the water works, sewers and other like property.

The validity of the act was first attacked in People vs. Hurlbut which was a proceeding in quo warranto. It was held by a majority of the Court that the new Board was entitled to the offices created by the act. This was put upon the ground that the powers conferred were to be exercised subject to the approval of the City Council; the Board's decision being merely advisory to the Council; so that the right and duty to finally decide all legislative questions was left to the City Council. The majority of the Court further held that the designation by the legislature of the persons constituting the first board was only provisional and hence that the Council was at liberty to displace them at will by new appointments.

The effect and scope of this decision is fully explained in People vs. Common Council, 28 Mich. 228. See pp. 235 et seq.

In this connection we call special attention to the opinions of Chief Justice Campbell and Judge Cooley in People vs. Hurlbut, wherein those jurists in their usual clear and forceful way demonstrate that the principle, which we are contending for in the case at bar, was part of the "Law of the land" independently of any provisions of the State Constitution; that the State Constitution recognizes that fact and must be so read and construed.

The Act creating the Board of Public Works was again attacked in

People vs. Common Council, 29 Mich. 108.

The Mayor, acting on the suggestion in People vs. Hurlbut that the legislative appointees were only provisional, nominated new members to supplant those named in the act. The Council declined to consider the nominations on the ground that the act was unconstitutional. Mandamus was then applied for to compel the Council to consider the nominations.

The principal constitutional objection urged against the act was that in some of its important features it delegated purely legislative discretion to the Board.

The Court held that it was part of the "Law of the land" that purely legislative discretionary powers as to purely local matters could be delegated only to a local representative body. It was held, however, that some at least of the powers vested in this Board did not involve such purely legislative discretion and hence the act was to that extent valid; and the mandamus was granted. The question as to what features were unconstitutional was reserved for future consideration when occasion arose out of the exercise of any of the powers which were questioned.

About the same time that the Board of Public Works was created the legislature passed an act creating a Board of Park Commissioners for the City of Detroit very similar to the act creating the Board of Public Works. The validity of the Park Commissioners statute was attacked in People vs. Lothrop, 24 Mich. 235. It was a quo warranto proceeding against one of the Commissioners designated in the act. He was held entitled to the office because the Common Council of the City had approved the acts and proceedings of the Park Board of which defendant was a member, and thereby ratified his appointment, thus curing any invalidity in the original appointment. The main features of the original Park Commissioner act are set forth in People vs. Common Council, 28 Mich. 228. The powers of the Board were merely administrative and advisory. Before any of their decisions or recommendations could take effect they had to be reported to and be approved by the City Council and the inhabitants of the City assembled in a "Citizen's Meeting."

In 1873, however, the Park Commissioners Act was amended so as to abolish the "Citizens' Meeting" and vest in the Park Board full powers to establish and maintain parks and to exercise the taxing power by way of general taxation and special assessment for park purposes. Both the "Citizens' Meeting" and the City Council were deprived of any authority in the matter.

This Act as thus amended was again attacked in People vs. Common Council, 28 Mich. 228.

The Park Board, under its increased powers, purchased property for a park and demanded of the Mayor and Council the issuance and sale of City bonds to provide the money to pay for the property purchased. The Mayor and Council refused to comply with the demand. The Park Board applied for a mandamus to compel the City authorities to issue the bonds; asserting that the Mayor and Council had only ministerial duties to perform. The argument in support of that law was precisely the same argument advanced by the defendants in error and adopted by the Court below in the case at bar. That argument was this: The legislature having plenary powers to create municipal corporations, and to define and limit their powers, and to create officers therein and define their powers; the legislature had the right to create the Board of Park Commissioners and vest them with such power as officers of the municipality as it saw fit. That it had the same right to delegate the taxing power to these officers of its own creation as it had to delegate that power to the Mayor and City Council. The Court held that the taxing power could not be delegated to the Board because it was not a representative body. The views of the Court are summed up in this sentence by Judge Cooley (p. 248):

"No precedent entitled to respect can justify such a

change of powers; for, from the very dawn of our liberties the principle most unquestionable of all has been this: that the people shall vote the taxes they are to pay, or be permitted to choose representatives for the purpose."

The act as amended was accordingly held invalid because of its conflict with the law of the land.

The question arose again in a somewhat different form in People vs. Mayor, 29 Mich. 343.

The previous decision was affirmed.

It will be noticed by reading the foregoing decisions that they were not based on any provision peculiar to the Michigan Constitution. They were based on principles which the Court held to be part of the "Law of the land" independent of any local constitutional limitations.

After these decisions the legislature of Michigan apparently observed the principles declared in the above cases. In all subsequent cases in Michigan that we have found involving laws for local taxation the principles above declared were carefully observed, as in Voight vs. Detroit and Goodrich vs. Detroit.

It will be noticed that in Vallely vs. Park Com. 16 N. D. 25 (See p. 35) the North Dakota Court quotes with approval the language of Judge Campbell in People vs. Com. Council, 28 Mich. 228, as a correct exposition of the law of the land.

SCHAEFER VS. WERLING, 188 U. S. 516:

Here all the purely legislative discretion was committed to the City Council by a combination of the second, third and fifth methods above enumerated.

In Indiana legislation of this character the principle seems to have always been observed, so far as disclosed from reported decisions from that State that we have found. The leading ones are cited in Adams vs. Shelbyville, 154 Ind. 467 referred to by Justice Brewer in Schaefer vs. Werling.

The law involved in Hibben vs. Smith, 191 U. S. 309 was the same as that in Schaefer vs. Werling.

As we understand the foregoing decisions of the United States Supreme Court they establish (1) That the apportionment of a tax or assessment for a local improvement may be committed for final decision to any board, tribunal or officer which the legislature may see fit to designate for such purpose; (2) that if the apportionment or any other administrative or quasi-judicial function is committed to an administrative board or officer, its decisions cannot be made final unless there is a hearing provided for upon adequate notice, which hearing may be either before the administrative officer or Board itself or before some other tribunal. (3) The question as to the necessity or propriety of any given work to be paid for either by general taxation or special assessment is a purely

legislative question; (4) A purely legislative question of that character may be finally decided without notice or hearing.

None of these cases hold that purely legislative power, as distinguished from administrative and quasi-judicial power, may be committed to a non-representative administrative officer or Board.

None of these cases are authority for the broad statement made by the Court below to the effect that the power to make local improvements and levy assessments therefor may be delegated by the legislature to any agency it sees fit to select, provided only a hearing upon notice is provided for as to the apportionment of the assessment.

See opinion in this case, in Printed Record pp. 6-13.
Turnquist vs. Board, 11 N. D. 514.
Erickson vs. Cass Co., 11 N. D. 494.
Martin vs. Tyler, 4 N. D. 278.

On the contrary all these cases involved laws in which the purely legislative discretion involved in making local improvements had been exercised by either the legislature itself or some local representative body to which such purely legislative power may be properly delegated in accordance with the "Law of the land;" and only the adminstrative and judicial powers incident to the execution of the work and the apportionment of the tax had been delegated to some other agency. It was these administrative and judicial functions which the Federal Supreme Court was dealing with and declared could be delegated to such agencies as the legislature saw fit.

This is specificially shown by the opinion of Justice Peckham in Fallbrook vs. Irrigation District, 164 U. S. 167. In that case the Circuit Court had construed the law to mean that the Board of Supervisors [the local representative body] were not permitted to exercise its judgment as to the necessity or propriety of the local improvement which the appointed administrative officers had decided upon and recommended, and, therefore, held that the administrative board had been improperly vested with purely legislative discretion, in violation of the "Law of the land." The construction placed upon the law by the Circuit Court was by the Supreme Court held to be erroneous. The State Supreme Court had construed the law to vest in the Board of Supervisors the right and duty to accept or reject the decisions and recommendations of the administrative officers; and that the power

to *finally* decide any purely legislative question was not delegated to the administrative officers. This construction by the State Court was conclusive on the Federal Courts. Consequently it was held that the purely legislative power was committed to the Board of Supervisors; and the adminstrative officers charged with the execution of the work possessed only administrative functions which could properly be delegated to them.

Justice Peckham expressly recognizes the distinction we have adverted to in the course of his opinion. At p. 169 the learned Justice says:

"There can be no doubt that the Board of Supervisors (if it have the power to hear the question of benefits as to which something will be said under another head of this discussion) would be a proper and sufficient tribunal to satisfy the Constitutional requirements in such cases." Again at p. 174 he says:

*"In the act under consideration, however, the establishment of its boundaries and the purposes for which the district is created if it be finally organized by reason of the approving vote of the people, will almost necessarily be followed by and result in an assessment upon all the lands included in the boundaries of the District. The legislature thus in substance provides for the creation not alone of a public corporation, but of a taxing District whose boundaries are fixed, not by the legislature, but after a hearing by the Board of Supervisors, subject to the final approval by the people in an election for that purpose. * * * The legislature when it fixes the district itself is supposed to have made proper inquiry, and to have finally and conclusively determined the fact of benefits to the land included in the district and the citizen has no constitutional right to any other or further hearing upon that question. The right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax."*

It is a noticeable fact that amongst the numerous cases involving local improvements which have come before the Federal Supreme Court on the ground of alleged conflict with the fourteenth amendment, there are none where the purely legislative power involved in ordering such work, and imposing the tax, as distinguished from the administrative and judicial power involved in executing the work and apportioning the tax, have been delegated to a non-representative board or officer.

It indicates that there have been no transgressions of the law of the land in that respect which have been sustained by the State Courts; or at least if any such transgressions have been tolerated by the State Courts, the transgressions were not of sufficient importance or evil effect to warrant an appeal to the highest tribunal in the Nation.

We have diligently searched the various State reports, and the cases are comparatively rare in which the State legislature has ventured to confer on a non-representative administrative officer or board any purely legislative power with respect to local or general taxation.

Aside from the case at bar we have found only one case where the delegation of such power to other than a local representative body has been sustained by a State Court. We refer to the case of State vs. Stewart (Wis.) 43 N. W. 947. In that case the Court without discussion cited as precedents Teegarden vs. Racine (Wis.) 21 N. W. 620, and Dickson vs. Racine 61 Wis. 545, although in both of those cases the power was delegated to the City Council. The Court apparently failed to notice the difference between the *administrative* board it was dealing with and a representative body like a City Council.

The following are cases where the principle we invoke was violated in acts delegating the taxing power and the statute in each instance held void as an infraction of the "Law of the land."

Vallely vs. Park Com. 16 N. D. 25.
Schultes vs. Eberle (Ala.) 2 So. 345.
Marr vs. Enloe (Tenn.) 1 Yerg. 452.
Hope vs. Deaderick (Tenn.) 8 Humph. 1.
Waterhouse vs. Board (Tenn.) 8 Heisk. 857.
Lipscomb vs. Dean (Tenn.) 1 Lea 546.
People vs. Lothrop, 24 Mich. 235.
People vs. Council, 28 Mich. 228.
People vs. Council, 29 Mich. 108.
People vs. Mayor, 29 Mich. 343.
State vs. Commissioners, 37 N. J. L. (8 Vroom) 12.
Inhabitants vs. Allen, 61 N. J. L. 228.
People vs. Parks, 58 Cal. 624.
Houghton vs. Austin, 47 Cal. 646.
People vs. Mayor, 51 Ill. 17.
Harward vs. Drain Co., 51 Ill. 130.
Hessler vs. Commissioners, 53 Ill. 105.
Lovingstone vs. Wider, 53 Ill. 302.
Foss vs. City, 56 Ill. 354.
Board vs. Houston, 71 Ill. 318.
Hinz vs. People, 92 Ill. 406.
State ex rel vs. Mayor, 103 Iowa 76.
Wyandotte Co. vs. Abbott, 52 Kans. 148.
Wyandotte Co. vs. Com. 61 Fed. 436.

As hereinbefore stated the doctrine announced and applied in the foregoing cases, namely, that taxation without representation is subversive of a Republican form of government and is, therefore, forbidden by the "Law of the land," has been explicitly recognized by the North Dakota Supreme Court in the Vallely case as well as in Morton vs. Holes; and is also expressly recognized in the decision under review in the case at bar. Yet that Court declines to apply it to the situation presented by this case, and justifies its holding by asserting that *special* assessments do not come within the principle.

This holding obviously involves the absurdity of asserting that all the people and property within the boundaries of a county or municipality are protected by the "Law of the land" against attempted exactions in the form of taxes by a non-representative body, provided the taxes are levied as general taxes on *all* property within the boundaries of the given County or municipality; but that no such protection exists if such exactions are imposed on only *part* of the people or property in any such County or subdivision.

The decision of the Court below also ignores the admitted fact that this defendant Board has imposed *general* taxes on the taxpayers of the townships of Morgan and Mayville; and if the proceedings are sustained, the plaintiffs in error, as taxpayers in those townships, will be subjected to the identical exactions in the form of general taxes, which the Court so emphatically denounced in the Vallely case as unlawful and forbidden by the "Law of the land."

The opinion below indicates that the Court below was impelled to the decision because its previous decisions were controlling upon it.

The doctrine of *stare decisis* has no just application to the situation here presented. The question now presented had confessedly never been before presented to the Court and was, therefore, an open question. Clearly the plaintiffs ought not to be deprived of the protection which both the State and Federal Constitutions guarantee to them—that they shall never be deprived of their property without due process of law—simply because other individuals had not properly availed themselves of that protection in previous cases.

The thought was suggested in the opinions of both the District and Supreme Courts that to hold the statute unconstitutional would work disastrous results to those who had invested their money in previous drainage enterprises. (See opinion of District Court in Printed Record pp. 4-6; Supreme Court opinion pp. 6-13.)

Such considerations are obviously improper ones to justify the denial of Constitutional rights, even if true. But as a matter of fact a decision in this case declaring the statute

unconstitutional would not affect in the slightest degree the validity or enforcibility of any tax, assessment, contract, warrant, bond or other security heretofore made in connection with any previous drainage project in the State.

It is thoroughly settled that a person may waive his constitutional rights just as he may waive any other right. When a drainage project has been permitted to proceed without any objection from those affected in the form of proper legal action to assert their constitutional rights that may be infringed by the undertaking, they are conclusively held to have waived such objections and to have impliedly consented to the project.

This was distinctly held by the North Dakota Supreme Court in

Erickson vs. Cass Co., 11 N. D. 494.

That is also the rule announced by the United States Supreme Court in

Wight vs. Davidson, 181 U. S. 371.

The only support for the ruling of the Court in this case found in its previous decisions are mere *dicta.*

In Martin vs. Tyler, 4 N. D. 278 it was urged that the creation of drain Commissioners deprived the County Commissioners of the management of the "*Fiscal affairs*" of the County, in violation of that provision of the State Constitution which declares that the management of the fiscal affairs of the Counties shall be vested in the Board of County Commissioners.

N. D. Const. Sec. 172.

In answer to this objection Judge Bartholomew said (p. 292): "*This* [drainage] *was a special purpose and its accomplishment required special legislative authority*" and added the remark "Which might be placed where the legislature saw proper."

As an answer to the argument advanced the language of that learned Judge was entirely proper; but it would be manifestly improper to take the closing remark as a deliberate statement that purely legislative power with respect to drainage could be delegated at the pleasure of the legislature. The case of Sheboygan County vs. Parker, 3 Wall. 93, which was cited by Judge Bartholomew, is not authority for such a broad statement. That was a case where certain officers were appointed to execute in the name of the County certain bonds. Their only powers were ministerial—to do the formal acts necessary to execute and deliver the securities which had been theretofore duly authorized in proper proceedings. The Court said (p. 96):

"*They do not exercise any of the political functions of County officers, such as levying taxes, etc.*"

The case so far as it is any authority at all, on the question we are debating, impliedly recognized the rule that *discretionary* as distinguished from *ministerial* duties cannot be delegated.

In Erickson vs. Cass Co., 11 N. D. 494, and Turnquist vs. Drain Com. 11 N. D. 514, the argument was that the Board could not be empowered to *finally* decide the *apportionment* of the tax. The question we are debating was not mentioned. The Court very properly overruled the objection made. In those cases, however, it made the broad unqualified declaration that the legislature could vest the Drain Commissioners with such powers as it saw fit; thus impliedly affirming that such a Board could be vested with an unlimited legislative discretionary power with respect to local taxation. To this extent we contend that the *dictum* is wrong, for the reasons heretofore pointed out.

The Court did not have in mind, and did not distinguish between the *apportionment* of the benefits and the purely legislative power of determining the question as to the necessity of the drain. All these *dicta* were in cases involving the drainage law before the amendment of 1903. Prior to that amendment the law required a petition from the persons owning a major portion of the land liable to assessment. (N. D. Rev. Code 1895 Sec. 1447 and N. D. Rev. Code 1899 Sec. 1447).

This petition was a declaration or admission by the majority of those affected that the drain was necessary and that its benefits would exceed the cost. It was in effect a submission of the question of the propriety of the proposed drain to the decision of the people affected. Those who petitioned consented to be taxed; and, being a majority of the locality affected, the decision might well be made conclusive on the minority as is generally done in all matters of local concern.

But this safeguard and restriction was done away with by the amendment of 1903 which eliminated the requirement of a majority petition; and substituted a petition signed by only six freeholders regardless of the area of their holdings as compared with the aggregate area of lands to be taxed. In short the 1903 amendment deprived the locality affected of any vote on the question; and left it to the uncontrolled discretion of the Board of Drain Commissioners.

The drain commissioners are appointed for a term of years by the Board of County Commissioners. They are not answerable to the people of the county over which they exercise jurisdiction, and in no sense a representative body. Yet they are vested with unlimited discretionary power to impose burdens in the form of special assessments on individuals and [illegible] municipalities, and their acts are not open to question in any form.

For the reasons heretofore stated we submit that such power is inconsistent with a republican form of government

and contrary to the law of the land. The proceeding by which such power is exercised is therefore the taking of property without "due process of law."

It may not be inappropriate in this connection to consider the Constitution and laws of North Dakota to show how scrupulously the principle of representative government has been observed in its government. It will show how radical a departure the drainage law in question is from the theory and practice which has always prevailed in that State.

The Counties as they existed under the territorial government were perpetuated.

N. D. Constitution, Sec. 166.

All proposed changes in County boundaries must be submitted to a vote of the people.

N. D. Const. Sec. 168.

The form of County government is left to the choice of the electors of each County.

N. D. Const. Secs. 170-171.

The governing body of a County may consist of the chairmen of the boards of supervisors of the several organized townships, or of a board of Commissioners, either three or five in number.

N. D. Const. Secs. 170-172.

Townships organized in Dakota Territory were continued. (N. D. Rev. Code 1905, Sec. 3053).

The organization of new townships was to be effected by the Board of County Commissioners on petition of a majority of the electors therein. (N. D. Rev. Code 1905, Sec. 3047 et seq.)

The division of organized townships is effected in like manner. (N. D. Rev. Code 1905, Sec. 3054 et seq.)

The governing body of a township is a Board of three supervisors chosen by the electors. (N. D. Rev. Code Sec. 3062, and Secs. 3126, 3133.)

Villages are organized by the Board of County Commissioners after submitting the question to a vote of the people affected. (N. D. Rev. Code 1905 Sec. 2843 et seq.)

The governing body of a village is a board of trustees, who are chosen by the electors. (N. D. Rev. Code 1905 Secs. 2857, 2864.)

Cities can be organized only under general law.
Const. Sec. 130 and 69 Subd. 33.

Towns or villages may be organized into Cities by the Board of County Commissioners of the County in which the proposed City is located; but the question of organization must first be submitted to the electors.
N. D. Rev. Code 1905 Secs. 2632-2635.

Cities organized under special laws of Dakota Territory are permitted to abandon their charters and re-organize under the general law by the vote of the electors.
N. D. Rev. Code Sec. 2632.

The governing body of a city consists of a Mayor and aldermen called the "City Council."
N. D. Rev. Code 1905 Secs. 2660, 2678.

The Mayor and Aldermen are all elective.
N. D. Rev. Code 1905 Secs. 2644, 2662, 2686.

All the officers of the various forms of school districts are also elective.

In the case of Beggs vs. Paine, 15 N. D. 436, beginning at p. 450 will be found a general summary of the tax proceedings showing how carefully the taxing power is limited and safeguarded against abuse.

The only attempts that we know of in the history of the State, to vest any purely legislative power in connection with the levying of either general taxes or special assessments in any body other than the elected representative governing body of the County or of the particular municipality affected, are the drainage law in question, and the two statutes respectively involved in Vallely vs. Park Com. 16 N. D. 25, and Morton vs. Holes 17 N. D. 154, in both of which the Court held the statute violative of the law of the land.

Respectfully submitted,
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SUPREME COURT OF THE UNITED STATES

October Term, 1911.

No. 76.

M. E. SOLIAH, W. H. M. LYCHE, and J. O. STAUPE,

Plaintiffs in Error.

—vs.—

SVEN HESKIN, K. T. PETERSON, and HANS KRINGLEN, constituting the Board of County Drain Commissioners in and for Traill County, North Dakota.

Defendants in Error.

In Error to the District Court of Traill County, State of North Dakota.

BRIEF FOR DEFENDANTS IN ERROR

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Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

The plaintiffs in error seek to perpetually enjoin the defendants, the Board of Drain Commissioners, from constructing a certain drain under the authority of the state statute in question, and from making assessments upon their property to pay the cost of construction thereof.

I.

This court is without jurisdiction to review the objections urged by plaintiffs in error against the validity of Chapter 23 of the Political Code of North Dakota, Revised Codes of 1905, known as the drainage law.

"In every case which comes to this court on writ of error or appeal, the question of jurisdiction must be first answered whether presented by counsel or not."

Defiance Water Co. v. Defiance, 191 U. S. 184.

Giles v. Teasley, 193 U. S. 146.

Plaintiff's assignments of error are five in number. They all go to a single proposition, and that is that the statute in question contravenes "that provision of the 14th Amendment of the United States constitution which forbids any state to deprive any person of his property without due process."

The jurisdiction of this court to review a decision of the

state court rests upon Section 709, Federal Statutes. This jurisdiction exists "where any * * * right, privilege or immunity is claimed under the constitution * * * and the decision is against the * * * right, privilege or immunity specially set up or claimed by either party under such constitution * * * *." It is well settled that in order to give this court jurisdiction the right, privilege or immunity claimed must have been especially set up or claimed in the court below at the proper time and in the proper way. The record in this case upon which this court must act, in determining the question of its jurisdiction, does not show that any such right was claimed or specially set up by plaintiffs in error. The grounds presented by them for the relief which they seek are contained in their complaint, found at pages 1 to 3 of the abstract. They did not claim or set up therein that the statute therein referred to, or that the proceedings which were being taken thereunder, which are set out at length in the complaint violated the 14th Amendment of the Federal Constitution, or any part thereof.

The defendants, the Drainage Board, interposed a demurrer to the complaint, (Abstract, p. 4). The trial judge sustained the demurrer.

Plaintiffs appealed from the order sustaining the demurrer to the State Supreme Court; that court reviewed the ruling of the trial court upon the demurrer and sustained the order.

It is thus seen that plaintiffs' entire claim was embraced in their complaint, and it did not contain either in the trial court or in the Supreme Court any claim that the statute in question, or that the acts which were being done, violated any Federal right. Their complaint was challenged by a general demurrer, which followed the language of the statute of North Dakota, Section 6854, Revised Codes of 1905, to-wit: "That the said complaint does not state facts sufficient to constitute a cause of action." This challenged the sufficiency of the complaint as it was written and prepared by plaintiffs herein. It did not raise a question as to the validity of the statute or a question that it contravened the 14th Amendment of the Federal constitution. The plaintiffs made no such claim in their written grounds for relief, and the demurrer raised no issue for decision upon questions other than those which were presented in the plaintiffs' pleadings.

We thus see that no attack was made upon the statute of record in the trial court, and no issue was presented to the trial court calling for a decision upon the question as to whether the statute in question violated the 14th Amendment. The same record was presented to the Supreme Court; that

court was called upon to review the order of the trial court sustaining the demurrer, and upon the same record which was before the trial court. The appeal to the state Supreme Court merely presented for review the question which had been determined by the trial court. The jurisdiction and authority of the Supreme Court of North Dakota upon the appeal, like that of other appellate courts, depends upon the record made in the trial court and transmitted to it by the district court. Its review is confined to errors made of record in the trial court.

deLendrecie v. Peck, 1 N. D. 422, 48 N. W. 342.
Mooney v. Donovan, 9 N. D. 93, 81 N. W. 50.
National Cash Register v. Wilson, 9 N. D. 112, 81 N. W. 285.
Fargo v. Palmer, 4 Dak. 232, 29 N. W. 463.
Goose River Bank v. Gillmore, 3 N. D. 188, 54 N. W. 1032.
Thuet v. Strong, 7 N. D. 565, 75 N. W. 922.

We are dealing with the question of jurisdiction of this court under the statute. This statute requires that the right must be claimed and must be specifically set up. If it is not claimed, or is not specifically set up, there has been a failure in a jurisdictional prerequisite which is essential to a review in this court. There was no such claim set up in the trial court; there was no such issue presented. The question was not involved in the ruling upon the demurrer, and a question which was not in issue could not have been embraced in the decision of the trial court. Neither was the question in issue upon the record in the state Supreme Court. There was no amendment to the complaint adding this claim or specifying it. The State Supreme Court had before it the same record the district court had, and the ruling upon the demurrer did not involve the determination of the question of a right which was not claimed in compliance with the statute. A claim made in briefs and oral arguments in the state court is not sufficient to give jurisdiction.

Zadig v. Baldwin, 166 U. S. 485.
Sayward v. Denny, 158 U. S. 180.

Nothing out of the record can be taken into consideration.
Walker v. Vallavaso, 6 Wallace, 124.
Davis v. Packard, 6 Peters, 41.
Armstrong v. Treasurer, 16 Peters, 245.

"The opinion of the court below, when transmitted with the record in accordance with Rule 8, Section 2, is no part of the record." England v. Gebhardt, 112 U. S. 502.

"The question whether a right or privilege claimed under the constitution or laws of the United States was distinctly and sufficiently pleaded and brought to the notice of the state court is itself a Federal question in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state." Carter v. Texas, 177 U. S. 442, 447.

In Howard v. Fleming, 191 U. S. 126, 137, the court said:

"It does not appear that the Federal character of the question was presented to the Supreme Court of the state, although in the opinion of the Supreme Court the questions themselves were fully discussed, but in the absence of any claim to protection under the Federal constitution, we are compelled to hold that we have no jurisdiction in the case coming from the Supreme Court of the state * * *."

In Spies vs. Illinois 123 U. S., 181, the court said:

"To give us jurisdiction under § 709 of the Revised statutes, because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the

proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is concerned."

Again in Appleby v. Buffalo, 221 U. S. 524, 529, the court said:

"This court has had frequent occasion to say that its right to review the judgment of the highest court of a State is specifically limited by the provisions of § 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the State court. In such cases it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment. Savward v. Denney, 158 U. S. 180, 183; Harding v. Illinois. 196 U. S. 78; Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97.

In the case at bar an elaborate assignment of error for the purpose of bringing the case to this court is found in the record, in which many rulings are referred to, which, it is alleged, resulted in deprivation of rights of Federal creation. But it is well settled that the assignments of error made for the purpose of bringing the case to this court cannot be looked to for the purpose of originating a right of review here. This must necessarily follow from the provisions of § 709, which permit a review in this court of rulings concerning claims of Federal right which were set up and denied in the state court. Neither the petition for writ of error in the state court after judgment, nor the assignments of error in this court, can supply deficiencies in the record of the state court, if such exist. Harding v. Illinois. 196 U. S. supra, and previous cases in this court therein cited."

Cases applying this statute are very numerous. We cite the following:

Brooks v. Missouri, 124 U. S. 394.

Brown v. Massachusetts, 144 U. S. 573.

Schuyler National Bank v. Bollong, 150 U. S. 85.

Chappell v. Bradshaw, 128 U. S. 132.
Texas & Pac. Ry. Co. v. Southern Pac. Ry. Co., 137 U. S. 48.
Miller v. Texas, 153 U. S. 535, 538.
Morrison v. Watson, 154 U. S. 111, 115.
Jacobi v. Alabama, 187 U. S. 133.
Baldwin v. Kansas, 129 U. S. 52.
Layton v. Missouri, 187 U. S. 356.
Loeb v. Columbia Twp. Trustees, 179 U. S. 472, 481, 485.
Michigan Sugar Co. v. Michigan, 185 U. S. 112.
Mutual Life Ins. Co. v. McGrew, 188 U. S. 291, 305, 308.
Oxley S. Co. v. Butter Co., 166 U. S. 648.
Kipley v. Illinois, 170 U. S. 182, 186.
Levy v. Superior Court, 167 U. S. 175, 177.
Dewey v. Des Moines, 173 U. S. 193.
Yazoo Ry. Co. v. Adams, 180 U. S. 1.
Green Bay Canal Co. v. Patten P. Co., 172 U. S. 58.
Utah Power Co. v. Street Ry. Co., 172 U. S. 475, 488.
England v. Gebhardt, 112 U. S. 502.
Land & Water Power Co. v. San Jose Ranch Co., 189 U. S. 177, 180.
Chicago & Northwestern Ry. v. Chicago, 164 U. S. 454, 457.
Howard v. Fleming, 191 U. S. 126, 137.
Ansbro v. United States, 159 U. S. 695.
Pim v. St. Louis, 165 U. S. 273.
Sayward v. Denney, 158 U. S. 180.
Miller v. Texas, 153 U. S. 535.
Loeber v. Schroeder, 149 U. S. 580, 585.
L. & N. Ry. Co. v. Smith H. Co., 204 U. S. 551.
Thomas v. Iowa, 209 U. S. 258, 262.
Western, etc., Co. v. Wilson, 213 U. S. 52.
Bank v. Estherville, 215 U. S. 347.

For decisions where the opinion of the Supreme Court assumed that the question was in issue, see
Chambers v. B. & O. R. R., 207 U. S. 142, 148.
San Jose L. & W. Co. v. S. J. R. Co., 189 U. S. 177.
Haire v. Rice, 204 U. S. 291.

If we are permitted to go to the written opinion of the trial judge which is printed in the abstract in connection with his order overruling the demurrer, as a source of information, we find that it affirmatively appears that the plaintiffs made no claim of any kind in the trial court that the statute violates the 14th Amendment. The trial judge in this opinion describes the issue which was presented to him for determination in the following language (abstract page 4):

"In other words, counsel for plaintiffs attack the constitutionality of the drainage law of this state and contend that the same is void, under the rule announced by our supreme court in the case of Vallely v. Bd. Park Com. Grand Forks, 111 N. W. 615, wherein the doctrine is stated that 'The power to tax is a legislative power, and cannot be delegated to boards or commissions whose appointment has not been in some way assented to by the people.' The sole issue therefore which has been raised by a demurrer to the complaint in the above action is as to the constitutionality of this law upon the grounds stated."

This did not present a Federal question. Such an objection is properly construed as raising the question whether the state legislature had the power, under the state constitution, to pass the act, and not as having reference to any repugnance to the constitution of the United States.

Porter v. Foley, 24 How. U. S. 415.
Miller v. Cornwall R. Co., 168 U. S. 131.
Capital Bank v. Cadiz First National Bank, 172 U. S. 425.
Kepley v. Illinois, 170 U. S. 182.
Kansas End. Ass'n v. Kansas, 120 U. S. 103.

The case of Vallely v. Park Commissioners, 16 N. D. 25, 111 N. W. 615, which was relied upon by plaintiffs in error and urged before the trial court, authorized the Board of Park Commissioners which was appointed by the city council to levy general taxes for the purpose of carrying out the purposes of the act. The Supreme Court held in that case "that an act of the legislative assembly authorizing the board appointed by the city council, without the consent of the people, to levy general taxes was unconstitutional as a usurpation of delegated power." No question as to the violation of the 14th Amendment of the Federal constitution was presented, considered or decided in that case. The questions presented and decided were under the state constitution.

It is clear, therefore, taking the opinion of the trial court

as an aid, that there was no Federal question presented to it and, as we have previously pointed out, no such claim was made in the record before the Supreme Court upon the appeal. It is true the opinion of the Supreme Court, on page 12 of the abstract, after having considered the merits of the appeal on other questions at some length, says: "It is next contended that the act in question violates the 14th Amendment to the Constitution of the United States, and Section 13 of the State Constitution prohibiting the taking of property without due process of law;" and the court states that in its opinion that the act is not vulnerable to this objection. We submit that this statement of the court, which is not a part of the record, cannot take the place of the specific claim which § 709 requires to be made as a basis of this court's jurisdiction. It amounts to no more than a statement that plaintiffs argued either orally or in their brief that the statute did violate the 14th Amendment, and it does not even state that there was an assignment of error in the briefs, or any record whatever of any such claim. But even if there had been it would be unavailable because plaintiffs had lodged the grounds upon which they sought relief in this complaint, which was before the trial court and before the Supreme court when it made its decision, and the complaint in fact contained no such claim. It was not claimed or specifically set up.

We take it, therefore, under the decision in Howard v. Fleming, 101 U. S. 126, 137, that the fact that the Supreme Court of the state discussed and considered the question, there being no claim made or specifically set up as required by statute, and the opinion not being a part of the record, will not be sufficient to give this court jurisdiction especially in view of the fact that the record shows affirmatively that the question was not in issue.

In Loeb v. Columbia Twp. Trustees, 179 U. S. 472, plaintiff in error, defendant in the lower court, attacked the complaint by a general demurrer, which complaint set out as a part of its cause of action a certain Ohio statute. This court held in that case upon the question of jurisdiction that it could look to the opinion of the Supreme Court to ascertain whether the Federal right was claimed, but added in doing so in that case, "By this, however, we must not be understood as saying that the opinion below may be examined in order to ascertain that which under proper practice should be made to appear in a bill of exceptions, or an agreed statement of facts, or by the pleadings." In that case the attack was made by a general demurrer, which was proper practice. It did not authorize or permit a separate and specific statement of the reasons for the demurrer. It was a case where the grounds urged under proper practice had to be sought for outside of the demurrer. The case [illegible] different. The Federal right here was, if relied upon at all, a part of the

plaintiffs cause of action and as such it should have been set out in the complaint. This was not done and it was not placed in issue in the record.

ON THE MERITS.

For the purpose of considering the merits, we will now assume that this court will find that it has jurisdiction. It will aid us in this review to first present a brief synopsis of so much of the act in question as is relevant to the questions presented, together with those parts of the opinion of the state Supreme Court which state the plaintiff's contentions, and constitute the only record of such contentions, and also the portions of the opinion answering the same.

SYNOPSIS OF NORTH DAKOTA DRAINAGE STATUTE.

Chapter 23, Political Code, Revised Codes of North Dakota for 1905, as amended by Chapter 93, Laws of 1907, and embracing Sections 1818 to 1850 of that Code, among other things, provides as follows:

1. It provides for a drainage board in each county in the state, consisting of three members to be appointed by the county commissioners, for the keeping of suitable records and an office at the county seat, for a clerk and a legal advisor (Sections 1819 and 1820).

2. It provides for the initiation of proceedings for construction of drains by written petitions describing the route of the proposed drain, which shall be signed by six or more free-holders whose property will be affected by the proposed drain where it is for the purpose of draining lands, and by a sufficient number of citizens of a municipality to show a public demand for the drain where its leading purpose shall be benefit to the health, convenience or welfare of the municipality. It requires the members of the drainage board to personally inspect the route of the proposed drain after the petition is filed, and if, in its opinion, it is necessary to the public good, it shall enter a resolution to that effect and appoint a surveyor to survey the land and make report to the board with "an estimate of the cost." On the filing of the surveyor's report, the board is required to fix a date for the hearing of objections to the petition, giving due notice thereof, and to hear all persons fully (Section 1821).

3. It requires the board to deny the petition if on the preliminary examination by the members before the survey or upon the hearing upon the petition they shall find there is not sufficient cause for making the petition, or that the drain

will cost more than the amount of benefit to be derived therefrom. On the other hand, if it shall appear that there was sufficient cause for making the petition, and that the drain will not cost more than the amount of benefits derived therefrom, they are required to make an order establishing the drain, (Section 1822).

4. It provides for acquiring of the right-of-way and vests the title thereof in the county (Section 1823).

5. It provides for an assessment of the cost of the construction of the drain by the drainage board by percentages which any lot, piece or parcel of land, county, township, village, city, town or railroad, shall be liable to pay by reason of benefits therefrom (Sections 1824, 1826).

6. It provides that all such proposed assessments for benefits shall be subject to review upon ten days' notice, at which time the board shall hear all complaints relative thereto (Sections 1825, 1828).

7. It provides that after the completion of the percentage assessment and its confirmation upon hearing, that the specific amounts shall be extended against each piece of property (Sections 1827, 1831.)

The remainder of the act relates to the letting of contracts, control of drains, collection of assessments, issuance of warrants, bonds, etc., which are not material to the questions here involved.

PLAINTIFFS' CONTENTIONS AND THE STATE SUPREME COURT'S OPINION.

The opinion of the State Supreme Court, so far as material in exhibiting the plaintiffs' contentions and the court's answer thereto is as follows (Abstract, pp. 7 to 13):

"The regularity of all the proceedings of the Board of Drain Commissioners is expressly conceded by appellants, their sole contention being that the drainage law of this state is unconstitutional and void; first, because it is claimed to be in conflict with Sec. 25 of the state constitution, which vests the legislative power of the people of the state in the legislative assembly, and second, that such law violates Sec. 13 of the state constitution, and the 14th Amendment to the Federal constitution forbidding the taking of property without due process of law.

(FIRST CONTENTION):

"Appellants' first and chief contention is that the Drainage Law is an unwarranted delegation of legislative power to the Board of Drain Commissioners, the members of which are not elected by and answerable to the people, but are merely appointed by the Board of County Commissioners. Counsel

for appellants have presented a very able and plausable argument in support of their contention, basing the same, to a large extent, upon the holding of this court in the recent case of Vallely v. Park Commissioners, 111 N. W. 615, and the authorities therein cited. It is vigorously asserted by them that the case is absolutely decisive in their favor of the case at bar. It was there held in effect that the taxing power which is vested by the constitution of the state in the legislative assembly cannot be delegated to a person or body not elected by and responsible to the people. In other words, that the legislature in enacting the Park Commissioner law exceeded its constitutional powers by delegating to the Park Commissioners, who were to be apopinted by the city council without any voice on the part of the people, the legislative power of levying general taxes upon the property within the city. It is, of course, clear that if the power to make special assessments is governed by the same principles which govern the assessment and levy of general taxes, the logic of appellants' argument is unanswerable, but if the contrary is true, their argument is entitled to no weight. The questions presented are of the gravest importance to the people of the state and after giving to them the consideration which their importance demands, we are entirely convinced that the act is not vulnerable to the attacks made upon it by appellants' counsel in this case.

We think appellants' counsel are clearly in error in their construction of the Vallelly opinion as well as the opinion in the cases cited therein. None of these cases deal with the question of the constitutional power of the legislature to delegate to an appointive body the right to make special assessments for local improvements, but they merely hold that the power to levy general taxes is a legislative power and that the same cannot be conferred upon such a non-representative body. The evident fallacy in appellants' entire argument in support of their first contention, as it appears to us, lies in their unwarranted assumption that because the power to levy special assessments for local improvements according to benefits is derived from the taxing power, that it necessarily follows that the power to make such special assessments cannot be delegated to other than representative bodies. While it must, we think, be conceded that under the great weight of authority the levy of special assessments is the exercise of the taxing power — (Hamilton on the Law of Special Assessments §§ 48-50 and cases cited) — still it is equally well settled and will not be denied that the right to order local improvements is derived from the police power, and that the levying of special assessments is a mere incident to the making of such local improvements. Although referable to the taxing power, local assessments are not, strictly speaking, taxes. As said by the Supreme Court of Missouri

in speaking of the power to levy special assessments: 'The power to make such assessments has been the prolific source of much forensic discussion, and difficulty seems to have existed in tracing this power to its true source and basing it upon a sound principle, but it is settled in Missouri and generally elsewhere that it is referable to the taxing power, though such assessments are not taxes in the sense that word is usually employed.' City of Independence v. Gates, 110 Mo. 374.

In Martin v. Tyler, 4 N. D., at page 303 of the opinion it is said: 'We understand counsel to admit—granting the existence of the power to levy special assessments—that such assessments differ radically in their nature and purpose from ordinary taxation and that the rule which requires uniformity in taxation has no application whatever to special assessments. This has become so elementary that citations are unnecessary.'

Is the contention of counsel for appellants sound that the power to levy such special assessments can only be delegated to elective or representative bodies? A brief review of the authorities, will, we think, completely demonstrate the utter fallacy of such contention. In Martin v. Tyler, supra, this court sustained the power of the legislature to delegate to an appointive board of drain commissioners the functions of constructing drains and levying assessments to pay for the same. After quoting from the opinion of the court in Bryant v. Robbins, 70 Wis. 258, in affirmance of such power, this court said: 'Surely this language is applicable to this case. It will not be contended for a moment that, under their general powers, the county commissioners could engage in the work of constructing drains; that they could for that purpose exercise the power of eminent domain, assess benefits, and institute proceedings to ascertain damages. This was a special purpose, and its accomplishment required special legislative authority; which might be placed where the legislature saw proper. See also Sheboygan Co. v. Parker, 3 Wall., 93.'

It is true, as counsel for appellants contend, that the precise point here urged was not raised in that case, but the court had the question squarely presented (but on other ground) as to the constitutional right of the legislature to vest in such appointive boards the powers conferred by the drainage act, similar to those conferred by the act in question.

In Erickson v. Cass County, 11 N. D. 494, this court again said: 'The legislature had the undoubted power to commit to the drainage board the ascertainment of the lands to be assessed, as well as the apportionment of benefits.' The constitutionality of the drainage law was also sustained in Turnquist v. Drain Commissioners, 11 N. D. 514. In the recent case of State v. Fisk, 15 N. D. 219, the court said: 'The board was acting under the regular appointment pursuant to statu-

tory authority. It had sole and exclusive authority to carry out the provisions of the drainage law. 'The matter to be dealt with was a mere legislative privilege granted upon any conditions the legislature saw fit to impose.' It is true the precise point now under consideration was neither raised nor discussed in these cases.

The Supreme Court of the United States in Bauman v. Ross, 167 U. S. 548, held that 'in the matter of assessing benefits under the right of taxation, it is within the discretion of the legislature to commit the ascertainment of the land to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of the commissioners appointed as the legislature may prescribe.'

In People v. Drainage Commissioners, 143 Ill. 417, it was held that drainage commissioners may tax for drainage purposes land in another township where the owner thereof has connected his ditches with those of the district; and that in laying such taxes they act as officers of their district not of the township.

In 2 Cooley on Constitutional Limitations, 3d Ed., page 1237, it is said: 'Where an improvement concerns a municipality, or some portion thereof, to be determined on an investigation of facts, it is most usual for the legislature to confer upon the municipal authorities full authority in the premises; to delegate to them the power to determine whether the improvement shall be made, and, if so, through what subordinate agencies, but under such restraints as are deemed important for public and individual protection, and, not uncommonly, the determination of the rule of apportionment is left to the same authorities. This is not only competent, but in general is deemed the proper course.

'In many cases, however, a special district may be requisite and this may embrace two or more municipalities, or parts of two or more. For this or other reasons any single municipality may be incompetent to deal with the case, and it may be necessary to create a special authority for the purpose. This is particularly the case with drains, with long highways and with levees, and when needful, a commissioner or board of commissioners will perhaps be provided for. It is not doubted that the legislature has authority to do this, when not hindered by any constitutional restriction. The choice of commissioners is sometimes made by the legislature itself, sometimes referred to a court, and sometimes where that course is practicable, given to the people concerned. Other methods of choice according to circumstances are not inadmissible.'

And at page 1241, it is further said: 'The rule that the legislative authority cannot delegate its powers, is also as imperative here as elsewhere, though it might be referred for decision to municipal authority, cannot be left to mere

administrative or ministerial officers. But the execution of the rule and the determination of the district, when it is to depend upon facts, is comomnly, not only with propriety, but of necessity, left to such officers.'

In the case of Foster v. Rowe, 107 N. W. (Wis.) 635, it was held: 'The power to equalize taxes is not legislative, in the sense that it cannot be delegated by the legislature to a board. On the contrary, the authority of the legislature to create such boards and authorize courts to appoint them, is well established.'

Hamilton on Special Assessments, Sec. 553, lays down the following rule: 'It has been said that the assessment is a ministerial act, and may be made by the city engineer where required by statute. That the power of the legislature over the entire scheme of assessment extends to the designation of the person or persons who are to make the assessment is unquestioned. Yet if the latter be made on the principle of benefits it is certain the person so designated acts judicially, and his acts are valid only when within the bounds of his discretion, judicially exercised.'

In 25 A. & E. Enc. of Law, pp. 1219-1220, in speaking of special or local assessments, it is said: 'The amount of the assessment, should, of course, be determined and the assessment levied by the officers, board or tribunal specified by the statute. The legislature itself may designate the officers or tribunal to determine the extent of the benefits and assess the persons benefited, or the appointment of assessors or commissioners of assessment may be delegated to the city council or to a court of justice.' Citing authorities:

In O'Brien & Co. v. County Commissioners, 51 Md., the court held a statute constitutional which provided for a Board of Examiners and Assessors for the purpose of laying out a certain avenue, defining its limits and making assessments for its completion. The court said: 'The exercise by the legislature of this power of appointment has been held to be constitutional,' citing Mayor, etc., v. Howard, 15 Md., 376.

In Crawford v. People, 82 Ill. 557, it was held that the general assembly of that state had the undoubted power to say who should ascertain and determine the extent of the special benefits and who should assess them.

In the case of Cook v. Nearing, 27 N. Y. 306, the constitutionality of the drainage law of that state which provided for the construction of drains and defraying the expenses thereof by assessing the land benefited, was involved and the court said: 'The legislature might lawfully direct the mode and manner of assessing or apportioning such damages upon the persons or property benefited thereby and designate or appoint the persons to make such assessment or appointment.'

In addition to the foregoing authorities we call attention

to the following: Egyptian Nav. Co. v. Hardin, 27 Mo. 495; Territory v. Scott, (Dak.) 20 N. W. 401; Mound City v. Miller, 170 Mo. 240; Turner v. City of Detroit (Mich.), 62 N. W. 405; State v. Crosby, (Minn.) 99 N. W. 636; Wurts v. Hoagland, 114 U. S. 606; Hagar v. Reclamation District, 111 U. S. 701 * * * * .

The recent case of Arnold v. Mayor, etc., of Knoxville, (Tenn.) 90 S. W. 469, 3 L. R. A. (N. S.) 837, contains a valuable discussion of the nature of special assessments and the principles underlying them, together with a reference to most of the text books, and many adjudicated cases relating thereto, where the distinction between such assessments and general taxes is clearly and fully explained.

We have been unable to find any authority and none has been called to our attention, sustaining appellants' first contention and we conclude that there are none. All the cases, without exception, apparently recognize the constitutional right of the legislature to confer upon local boards or officers, whether elective or appointive, the functions of assessing and apportioning the benefits for local improvements."

(SECOND CONTENTION):

"It is contended by appellants' counsel that because the Drainage Board is authorized to apportion a part of the cost of a drain to a city, town or township to be raised by general taxation therein, that this is equivalent to the vesting in such board, to this extent, of the power to levy general taxes, and hence is forbidden by the principles enunciated in the Vallelly case. We cannot yield our assent to this contention. The distinction between the principles involved in the Vallelly case and those involved in the case at bar has, we think, been sufficiently pointed out in this opinion. In the one case the delegation of legislative power to levy taxes was involved, while in the other the power of the legislature to authorize local improvements to be made and to designate the board or officers who shall apportion the benefits and levy special assessments accordingly, was involved. Under the act involved in the Vallelly case it was attempted to confer upon the Board of Park Commissioners the authority to create general indebtedness for park purposes and to levy general taxes against all property within the city to pay the same, while under the drainage law the Drainage Board is given authority to levy special assessments only against lands specially benefited. And where by the construction of a drain an entire city, town or township receives special benefit therefrom we see no valid reason why such corporation cannot be required as such to contribute its share toward the cost of such local improvement.

In Bryant v. Robbins, supra, the supreme court of Wis-

consin in speaking upon a similar question said: 'as we have said, the law plainly makes the land which is benefited by the drainage the principle source from which the means to do the work are derived; and wherever a city or town, as a corporation, is likewise benefited, there is no injustice in charging it to the extent of the benefits received.' See also Town of Muskego v. Drainage Commissioners, (Wis.) 47 N. W. 11; in re Kingman, (Mass.) 12 L. R. A. 417.

The authority to require such public improvements to be made is derived from the police power although the authority to levy special assessments to pay for the same comes from the taxing power."

(THIRD CONTENTION):

"It is next contended that the act in question violates the 14th Amendment to the Constitution of the United States and Section 13 of the State Constitution prohibiting the taking of property without due process of law. This contention is based principally upon the first contention. Counsel say in their brief: 'In dealing with the objection we make we are not at all concerned with how the power is exercised by those who assert the power, but with the right to exercise it at all. * * * If the drainage board could be given any legislative powers of a discretionary nature, then there could be no question that the procedure prescribing the manner of exercising it as found in this Act would fully comply with the requirements of due process.' What we have already said upon appellants' first contention is therefore a sufficient answer to this last contention. Furthermore, this court fully disposed of this question adversely to appellants' contention in the following cases: Erickson v. Cass County; State v. Fisk, and Turnquist v. Cass County, supra. In State v. Fisk it was said: 'The statute imposes upon the board the duty to assess benefits. A review is provided for, and a hearing granted, where evidence may be produced. The board acts judicially in assessing benefits. The board is acting under a delegation of power from the legislature in respect to local affairs, but in the exercise of that power is exercising functions in their nature judicial. Stone v. Little Yellow Drainage District, 118 Wis. 388, 95 N. W. 405; Dodge County v. Acom, et al., (Neb.) 100 N. W. 136; Erickson v. Cass County, supra. * * * In Erickson v. Cass County the drainage law was construed and its constitutionality upheld as against the contention that it authorized the taking of property without due process of law. It was competent for the legislature to invest the Drainage Board with power in good faith and after [illegible] an opportunity to be heard to finally determine the benefits accruing to each tract of land in the drainage district. * * *.' We see no reason to depart from

the rule thus so well established in this state. See also Gray's Limitations on Taxing Power. Sec. 1161.

Our conclusion is that the act in question is not vulnerable to any of the objections urged against it and *the order appealed from is accordingly affirmed.*"

The State Supreme Court thus holds that the act does not violate any of the provisions of the state constitution, and to this extent its decision is not subject to review by this court. Fallbrook Irrigation Dist. vs. Bradley, 164 U. S. 112, 155.

We shall assume for the purposes of argument that as to the contentions stated in the opinion of the State Supreme Court as having been urged against the validity of the act as in contravention of the 14th Amendment, are subject to review.

The purpose of this act is to reclaim wet lands and to make them fit for use, and to promote the public health. This is a proper subject for legislation under the police power of the state.

"The mode or manner in which these results are to be accomplished is left within the discretion of the state, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by state, nor any regulation adopted by local governmental agency, acting under the sanction of state legislation, shall contravene the constitution of the United States or infringe any right granted or secured by that instrument." (Jacobson vs. Mass. 197 U. S. 11, 24, 25).

In Head v. Amoskeag Mfg. Co., 113 U. S. 9, 22, the court said:

"The statutes which have long existed in many States, authorizing the majority of the owners in severalty of adjacent meadow or swamp lands to have commissioners appointed to drain and improve the whole tract, by cutting ditches or otherwise, and to assess and levy the amount of the expense upon all the proprietors in proportion to the benefits received, have been often upheld, independently of any

effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. Coomes v. Burt, 22 Pick. 422; Wright v. Boston, 9 Cush. 233, 241; Sherman v. Tobey, 3 Allen, 7; Lowell v. Boston, 111 Mass. 454, 469; French v. Kirkland, 1 Paige, 117; People v. Brooklyn, 4 N. Y. 419, 438; Coster v. Tide Water Co., 3 C. E. Green, 54 68, 518, 531; O'Rielly v. Kankakee Valley Draining Co., 32 Indiana, 169."

Again, in Barbier v. Connolly, 113 U. S. 27, 31, in discussing the effect of the guarantee of due process of law contained in the 14th Amendment upon the exercise of the police power by the state, the court said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marches and irrigating arid plains."

Again, in French v. Barber Asphalt Paving Co., 181 U. S. 324, it was said:

"It was not the intention of the Fourteenth Amendment to subvert the systems of the states pertaining to general and special taxation. That Amendment legitimately operates to extend to the citizens and residents of the States, the same protection against arbitrary state legislation, affecting life, liberty and property, as is afforded by the Fifth Amendment against similar legislation by Congress, and the Federal Courts ought not to interfere when what is complained of is the enforcement of the settled laws of the State, applicable to all persons in like circumstances and conditions, but only when there is some abuse of law, amounting to confiscation of property, or deprivation of personal rights."

See also Wurts v. Hoagland, 114 U. S. 606.

Again, in Jacobson v. Massachusetts, 197 U. S. 11, 24, 25:

"The authority of the State to enact this statute is to be referred to what is commonly called the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution. Although this court has refrained from any attempt to define the limits of that power, yet it has distinctly recognized the authority of a State to enact quarantine laws and 'health laws of every description;' indeed, all laws that relate to matters completely within its territory and which do not by their necessary operation affect the people of other states. According to settled principles the police power of a State must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety. Gibbons v. Ogden, 9 Wheat. 1, 203; Railroad Company v. Husen, 95 U. S. 465, 470; Beer Company v. Massachusetts, 97 U. S. 25; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 661; Lawton v. Steele, 152 U. S. 133. It is equally true that the State may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety. The mode or manner in which those results are to be accomplished is within the discretion of the State, subject, of course, so far as Federal power is concerned, only to the condition that no rule prescribed by a State, nor any regulation adopted by a local governmental agency acting under the sanction of state legislation, shall contravene the Constitution of the United States or infringe any right granted or secured by that instrument."

Again, in New Orleans Gas Light Co. v. Drainage Commission of New Orleans, 197 U. S. 453, 460:

"The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The Drainage Commission, in carrying out this important work, it has been held by the Supreme Court of the State, is engaged in the execution of the police power of the State. State v. Flower, 49 La. Ann. 1199, 1203."

Again, in the case of C., B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 584, 587, 588, 592, involving the constitutionality of the Illinois farm drainage act, the court said:

"We refer also, as having direct application here, to some of the cases, familiar to the profession, that recognize the possession by each State of the power, never surrendered to the Government of the Union, of guarding and promoting the public interests by reasonable police regulations that do

not violate the constitution of the State or the Constitution of the United States. Gibbons v. Ogden, 9 Wheat. 1; Railroad Co. v. Husen, 95 U. S. 465, 472; Patterson v. Kentucky, 97 U. S. 501, 503; Morgan v. Louisiana, 118 U. S. 455, 464; Hennington v. Georgia, 163 U. S. 299, 308, 309; N. Y., N. H. & H. Railroad Co. v. New York, 165 U. S. 628, 631."

Pages 584, 585.

"The Drainage Districts organized, as are the appellees, under that law are invested with the right of eminent domain and the power of taxation, upon the theory that they are public utilities and are held to be quasi public corporations. In their organic character they do not represent merely the individual property owners or themselves, but they represent the State in carrying out its policy, as found in the common law and declared by its constitution and statutes."

Pages 587, 588.

"The learned counsel for the railway company seem to think that the adjudication relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. Lake Shore & Mich. South. Ry. v. Ohio, 173 U. S. 285, 292; Gilman v. Philadelphia, 3 Wall. 713, 729; Pound v. Turck, 95 U. S. 459, 464; Railroad Co. v. Husen, 95 U. S. 470. And the validity of a police regulation, whether established direct-

ly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose."
Page 592.

See also:
Davidson v. New Orleans, 96 U. S. 97.
Hagar v. Reclamation Dist., 111 U. S. 761.
Spencer v. Merchant, 125 U. S. 345, 355, 356.
Watson v. Nevin, 128 U. S. 578, 582.
Lent v. Tillotson, 140 U. S. 316, 328.
Ill. Cent. Ry. Co. v. Decatur, 147 U. S. 190, 198, 199.
Paulson v. Portland, 149 U. S. 30.

In Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 157, 158, the court said:

"It has often been said to be extremely difficult to give any sufficient definition of what is embraced within the phrase 'due process of law,' as used in the constitutional amendment under discussion. None will be attempted here. It was stated by Mr. Justice Miller, in Davidson v. New Orleans, 96 U. S. 97, 104, that there was 'abundant evidence that there exists some strange misconception of the scope of this provision as found in the Fourteenth Amendment. In fact it would seem from the character of many of the cases before us and the arguments made in them, that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinion of every unsuccessful litigant in a state court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.' Of course, no such jurisdiction exists or is claimed to exist by the parties here.

* * *

It never was intended that the court should, as the effect of the amendment, be transformed into a court of appeal, where all decisions of state courts involving merely questions of general justice and equitable considerations in the taking of property should be submitted to this court for its determination. The final jurisdiction of the courts of the States would thereby be enormously reduced and a corresponding increase in the jurisdiction of this court would result, and it would be a great misfortune in each case. Mobile County v. Kimball, 102 U. S. 691, 704; Missouri Pacific Railway Com-

pany v. Humes, 115 U. S. 512, 520. We reiterate the statement made in Davidson v. New Orleans, supra, that 'whenever by the laws of the State or by state authority a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.' "

We might well rest our answer to the contentions of plaintiffs in error wholly upon the analysis, reasons and answers contained in the opinion of the State Supreme Court previously set out. We will, however, supplement them to some extent and especially by reference to the decisions of this court.

As to plaintiffs' first contention, namely, that the act is void because it confers upon an appointive board the power of imposing special assessments, it is entirely clear that the conclusion of the state Supreme Court was correct. This case, as we have seen, was presented by the plaintiffs to the trial court and to the state Supreme Court upon the theory that the authority given by this act to drainage boards to impose special assessments against property benefited by a drain was the same power as that attempted to be given to an appointive park board by the state legislature in the Park Board act which was involved in the case of Vallelly v. Park Board, supra, which was the power to levy general taxes, and that it is therefore subject to the same rules and limitations. The state Supreme Court has pointed out clearly the distinction between general taxes and special assessments and has held in this case that the act authorizing the appointive drainage board to impose special assessments upon property benefited is not an improper delegation of power. Now we submit that this conclusion, whether right or wrong, does not involve a Federal question. "Due process of law" does not guarantee the correctness of the decisions of State Supreme Courts in construing their statutes or constitutions. To make the claim available, there must be a violation of some fundamental right which is within the guarantee of the 14th Amendment. We know of no principle or rule of procedure of common acceptance relating to this subject which would make the delegation of this duty to appointive boards a violation of due process within the meaning of the Federal constitution.

In Fallbrook Irrigation District v. Bradley, supra, this court said:

"If the act violate any provision expressed or properly implied in the Federal constitution, it is our duty to so declare it, but if it does not there is no justification for the Federal courts to run counter to the decisions of the highest state courts upon questions involving the construction of state statutes or constitutions on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

The question, however, as to the power of the legislature to cast upon appointive boards the duties contained in this act is not an open one. It has been authoritatively settled by repeated decisions that such power as is given by this act may be vested in appointive boards.

It is very clear that counsel for plaintiffs in error have failed to recognize the distinction between general taxes and special assessments; that this error lies at the basis of their contention. The distinction is now universally recognized by all state courts. The North Dakota Supreme Court, in harmony with the decisions of other states and of this court, has held that special assessments for local improvements, while imposed under the taxing power as an incident to the proper exercise of statutes enacted under the police power, are not taxes within the meaning of constitutional provisions relating to general taxes.

Rolfe v. City of Fargo, 7 N. D. 640, 76 N. W. 242.

Webster v. City of Fargo, 9 N. D. 208, 82 N. W. 732, affirmed 181 U. S. 394.

It may be safely stated, we think, that all state courts of last resort now recognize the distinction between general taxes and special assessments. The State of Tennessee did not recognize this distinction until 1905 when it reversed its former views in Arnold v. Knoxville, 90 S. W. 469, 3 L. R. A. (N. S.) 837, in an opinion which contains a most comprehensive review of the views of the text writers and opinions of courts upon this subject. Without referring to the cases at length, we may say that under the decisions of our State Supreme Court and of this court and the state courts generally special assessments for local improvements, while imposed under the power of taxation, are not taxes within the meaning of constitutional provisions relating to general taxes.

The Supreme Court of Illinois, in Kilgour v. Drainage Commissioners, 111 Ill. 342, 350, in considering the constitutionality of the Illinois drainage act, said:

"The provisions of the constitution in relation to taxes have no application to the imposition of the burdens imposed by this act. These assessments are not taxes; it is a special regulation whereby an owner is required to pay for benefits specially conferred upon his land."

In judging what is "due process of law," said Mr. Justice Bradley in Davidson v. New Orleans, 96 U. S. 97, 107, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain or the power of assessment for local improvements, or none of these; and if found to be suitable or admissable, in the special case it will be adjudged to be due process of law, but if found to be arbitrary, oppressive and unjust, it may be declared to be not 'due process of law.'"

The conclusion of the State Supreme Court in sustaining this act is in harmony with the views of this court.

In Bauman v. Ross, 167 U. S. 548, 589, 590, 591, 593, it was said:

"The legislature, in the exercise of the right of taxation, has the authority to direct the whole, or such part as it may prescribe, of the expense of a public improvement, such as the establishing, the widening, the grading or the repair of a street, to be assessed upon the owners of lands benefited thereby. Davidson v. New Orleans, 96 U. S. 97; Hagar v. Reclamation District, 111 U. S. 701; Spencer v. Merchant, 125 U. S. 345, 355, 356; Walston v. Nevin, 128 U. S. 578, 582; Lent v. Tillson, 140 U. S. 316, 328; Illinois Central Railroad v. Decatur, 147 U. S. 190, 198, 199; Paulsen, v. Portland, 149 U. S. 30. This authority has been repeatedly exercised in the District of Columbia by Congress, with the sanction of this court. Willard v. Presbury, 14 Wall. 676; Mattingly v. District of Columbia, 97 U. S. 687; Shoemaker v. United States, 147 U. S. 282, 286, 302.

The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited. Spencer v. Merchant, and Shoemaker v. United States, above cited; Fallbrook District v. Bradley, 164 U. S. 112, 167, 168, 175, 176; Ulman v. Baltimore, 165 U. S. 719. See also the very able opinion of the Court of Appeals of New York, delivered by Judge Ruggles, in People v. Brooklyn, 4 N. Y. 419, 430. * * *

If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provision for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land,

his property is not taken without due process of law. Davidson v. New Orleans, Spencer v. Merchant, Walston v. Nevin, Lent v. Tillson, Paulsen v. Portland, and Fallbrook District v. Bradley, above cited."

Pages 589, 590.

"And there does not appear to be any uncertainty as to which alternative was in the contemplation of Congress. The lands to be assessed being described generally as '*the lands benefited*' by the condemnation and establishment of the new highway, or by the abandonment of an existing highway, and again as the '*property thereby benefited*,' and as the lands which the jury 'find to be so benefited.' without any words of restriction to lands in the particular sub-division, the reasonable inference is that all lands so benefited, lying within the exclusive jurisdiction of Congress over the District of Columbia, may be included in the assessment. *The question what parcels of lands, within the district so ascertained, are benefited, and therefore liable to be assessed, might justly and constitutionally, as appears by the cases above cited,* be committed by Congress to the determination of the tribunal entrusted with the authority of making this assessment."

Page 591.

"Likewise, in the matter of assessing benefits, under the right of taxation, it is within the discretion of the legislature, as shown by the authorities already referred to upon this subject, to commit the ascertainment of the lands to be assessed, as well as the apportionment of the assessment among the different parcels, to the determination of commissioners appointed as the legislature may prescribe. See also People v. Buffalo, 147 N. Y. 675.

Whether the estimate of damages and the assessment of benefits shall be entrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, no [illegible] may appear to it to require. And there are many precedents for entrusting the performance of both duties to the same persons.

Page 593.

In Barbier v. Connolly, 113 U. S. 27, 32, the court held that the 14th Amendment does not impair a proper exercise of the police power of the state, and in the course of its opinion said, in reference to legislative acts passed under this power that "in the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet if no discrimination against any one be made, and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the state; they can be remedied only by the state."

The North Dakota Supreme Court has approved the power of its legislature to commit to appointive drainage boards the duties given to them by the act in question. No case from this court has been cited by counsel which holds that such duties as are placed on the drainage board by this act may not be committed to appointive boards. On the contrary, as will appear from the cases already cited, this court has held repeatedly that such power as is given to these boards may be lodged by the legislature in such boards or bodies as it may see fit to designate to carry out its will. The contention that the boards must be elective and cannot be appointive is based upon a failure to recognize the difference between general taxes and special assessments, the purposes for which they are levied and the principles which govern them. A drainage district is frequently called a quasi corporation, but from the very limited purpose for which it is created, it is not possessed of the powers of local self-government. It is called into existence by the legislature for a special purpose and is limited to that purpose, namely, of doing the administrative acts involved in making the improvement which has been authorized by the legislature to be made and in the manner as authorized by it. The law authorizing an improvement and providing the requirements and rules under which it is to be constructed is made by the legislature and is complete. The drainage board and the drainage district are called into existence to administer and apply this law. The property owners are accorded their rights as electors to assist in choosing the members of the legislature who make the law. There is no constitutional rule or principle which requires administrative agents to be chosen by the electors who are interested in the acts which such administrative agents are authorized to perform, and yet that, of necessity, is the rule for which counsel for plaintiffs in error must contend. In the absence of a constitutional requirement that the agents shall be elective, the legislature may use its discretion as to their appointment, and the courts are not authorized to interfere.

In Mayor, etc., v. New Iberia, (La.) 31 Sou. 305, 308, the court said:

"The argument in support of the other proposition is that the constitution contemplates that the drainage districts shall be distinct entities, and that the effect of the act is to defeat that purpose, by practically merging them in the parishes. The error here lies in the failure to distinguish between the drainage districts and the governing bodies provided for the administration of their affairs. Granted that the drainage district is to have an autonomy distinct from that of the parish. Nevertheless the power to determine by whom its affairs are to be administered is left entirely within the discretion of the general assembly. And if the convention which framed the constitution did not deem it wise to control that discretion, certainly the courts will not undertake to do so."

In People v. Reclamation District No. 551, (Cal.) 48 Pac. 1016, 1018, the court said:

"The attorney general also contends that the entire law in regard to reclamation districts is void, because it requires a property qualification for voters. Const. art. 2, § 1; also, article 1, §24. If these quasi corporations are municipal corporations, designed to provide for local self-government, I see no answer to this suggestion. The point seems to be sustained by the decision in Re Madera Irr. Dist., 92 Cal. 320, 28 Pac. 272, 675. There is a difference, however, between an irrigation district under the Wright act and the reclamation districts. In my opinion, these latter districts are not municipal corporations, and no one is a voter in the sense of the constitutional provisions. Certainly there can be no electors when there are no residents within the district. The district, as already said, was part of a scheme for conducting a public work, and not for self-government. In regard to street work and other local improvements it has often been provided that the work shall only be done upon the application of the owners of a majority of frontage, or of a certain proportion of the owners of land; and, if the law had provided that the owners could elect a committee of their number to superintend the work, I do not see how it could change the principle. This could not constitute an exercise of the elective franchise, which is the matter to which the constitutional provisions have reference. The general public has an interest in the reclamation of swamp and overflowed land. Nevertheless, it is one of those public enterprises which result in a benefit to private lands, and therefore the cost is made a charge upon such land. That those who are specially interested, and who must pay for the improvement, are heard upon the question as to whether it shall be done, and are permitted to ap-

point those who shall superintend it, is not unusual, nor would it constitute an exercise of the elective franchise."

The elective theory which is urged is therefore not only inadmissible upon principle, but it would, at least as applied to the drainage of wet and marshy lands, defeat all workable laws for their reclamation. Counsel for plaintiffs in error contend that as a part of the law of the land, the electors have the inalienable right to participate in the choosing of the members of the drainage board who will impose the special assessments. Let us see where the application of this alleged principle leads to. If the elector has this right, it follows as of course that each drainage district must have its own officers, the electors of each separate district must choose the officers of their particular district. A drainage district, territorially, is bound by the property benefited and is not coterminus with any municipal sub-division. A county may have, 10, 20, 30 or even 100 separate drainage districts, depending as to their number and extent upon the conditions in the county as to drainage. Manifestly, upon counsel's theory, the county commissioners, although elected, could not act as a drainage board for they are selected by electors in part who are not specially interested in a particular drainage district. The electors of one drainage district could not choose the officers for another drainage district. Each district, of necessity, under the principle advocated by counsel, would have to act by itself and have its officers selected by the electors of that particular district.

The first obstacle, and it is an unsurmountable one, is that in advance of the organization of the drainage district it has no boundaries, and there is no way of telling what electors will be included within the particular district. All this depends upon the determination of the question of benefits. The legislature has fixed the rule which determines the boundaries, but the fact as to what lands shall be included must of necessity depend upon a determination by someone authorized to act in determining the benefits, and again it may well be that a district composed of low, wet and marshy lands will have no electors at all, being unfit for human habitation because of its condition, or it may not have sufficient electors to serve as officers, or it may be that the owners of the lands affected are minors or non-residents or corporations. Under such conditions, which can hardly be called exceptional for we are dealing with wet and marshy lands, it is manifest that a drainage act which limited the membership of the board to administer the act to those who are chosen by the electors of the drainage district would fail in the purpose which it was intended to accomplish because of this most unnatural limitation. The State Supreme Court has sustained the power of the legislature to commit the duties under this act to an appointive board which has an office at the county

seat and a clerk and a legal advisor and complete records. It protected the property owners by given them a hearing both upon the petition before granting it and upon their assessments, the latter hearing being all that is necessary, under the decisions of this court, to constitute due process of law. It is a workable statute and well adapted to accomplish the purpose for which it was enacted. It is not claimed that in its operation it is harsh or oppressive and no principle of government has been violated by the legislature in committing the administration of the law to the appointive board.

The second contention of counsel for plaintiffs in error was "that because the drainage board is authorized to apportion a part of the cost of the drain to a city, town or township to be raised by general taxes therein, that that is equivalent to vesting in such board to this extent, the power to levy general taxes, and hence is prohibited by the principles enunciated in the Vallelly case." (Abst. p.. 11).

The opinion of the Supreme Court in which alone a record of this claim is found does not show that it was urged as constituting a violation of the 14th Amendment to the Federal constitution or of any Federal right. We therefore urge that the question as to the validity of those portions of the act which authorize the placing of a special assessment against municipalities is not properly before this court. However, we submit that the conclusion of the state Supreme court was entirely correct. It pointed out in its opinion the distinction between the Vallelly case and the present case; that in the Vallelly case the court was dealing with an act of the legislature which authorized an appointive board to create a general debt and impose a general tax against the city; that in the act under consideration there is involved only the question of the right of the legislature to provide for appointive boards in the matter of local improvements to be paid for by special assessments, and that the assessments against municipalities under this act are special assessments. Counsel is in error in his contention that this act authorizes the drainage board to levy a general tax against a municipality. It is true the special assessments laid against townships must be paid by general taxes, but the drainage board does not levy the tax. This is done by the township board under a direct command of the legislature which is contained within the act itself. A hearing is accorded to municipalities as well as to land-owners both before the granting of the petition and the making of the apportionment of the cost. The drainage board merely finds after this hearing the amount of benefit which will accrue to the municipality by reason of the construction of the proposed drain and certifies it to the proper officers and the legislature requires the proper taxing officers to extend the tax in its annual levy.

See §§ 1826, 1831, Revised Codes of 1905.

The levy is in fact made by the legislature through the administrative officers referred to, who act under and upon a definite rule prescribed by the legislature for their guidance.

The State Supreme Court has found that this provision of the act is not void and it does no violence to the "law of the land," so as to authorize this court to declare it void.

In King v. Reed, 43 N. J. Law, 186, the court had under consideration the validity of an act providing for the construction of a sewer which benefited three towns and provided for the appointment of three commissioners to apportion the benefits which would accrue to these towns. The act was attacked on the ground that it was an attempt to delegate legislative power and was therefore void. The court, after referring to a previous case which attempted to fix assessments upon towns without a definite rule, sustained the act and said (p. 200):

"It was held that a statute of this kind must itself distribute the burden or prescribe a standard by which such distribution is to be made.

. The present act differs from that then under consideration, is the one material feature, that this act does provide a standard, and that standard is an equitable one, being the proportionate benefits received by the property in each town.

As held in the case just mentioned, the legislature must designate the rule of taxation, but the method of executing the law in accordance with the rule is administration and not legislation.

Says Judge Cooley: 'If the rule is prescribed which in its administration works out the result, that is sufficient; but to refer the making of the rule to another authority would be in excess of legislative authority.' Cooley on Taxation, 50.

I think that the legislature, instead of fixing upon each of the townships affected by this work an arbitrary sum, acted wisely, as well as constitutionally, in fixing a standard of apportionment—the very best that could be devised."

This court has recognized and sustained the right to impose special assessments against municipalities as well as the determination of the amounts through appointive agents.

In Bauman v. Ross, 167 U. S. 548, the court had under consideration the constitutionality of an act of Congress relating to highways which authorized commissioners to assess half of the cost upon the District of Columbia and the other half upon the property benefited.

We quote from that case:

"Congress, in the exercise of the right of taxation in the District of Columbia, may direct that half of the amount of the compensation or damages awarded to the owners of lands appropriated for the public use for a highway shall be

assessed and charged upon the District of Columbia, and the other half upon the lands benefited thereby within the District, in proportion to the benefit; and may commit the ascertainment of the lands to be assessed, and the apportionment of the benefits among them, to the same tribunal which assesses the compensation or damages." (Page 549).

* * * "Whether the estimate of damages and the assessment of benefits shall be entrusted to the same or to different commissioners, is a matter wholly within the decision of the legislature, as justice and convenience may appear to it to require. And there are many precedents for entrusting the performance of both duties to the same persons." (Page 593).

In County of Mobile v. Kimball, 102 U. S. 691, the court had under consideration an act of the legislature of the State of Alabama which provided for the improvement of Mobile harbor, and authorized the imposition of the cost of construction thereof by commissioners against the County of Mobile. The court sustained the act (p. 698):

"That power which every State possesses, sometimes termed its police power, by which it legislates for the protection of the lives, health, and property of its people, would justify measures of this kind." * * * *

"The expenses of the work were of course to be ultimately defrayed by taxation upon the property and people of the county. But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution. Taxation only exacts a contribution from individuals of the State or of a particular district, for the support of the government, or to meet some public expenditure authorized by it, for which they receive compensation in the protection which government affords, or in the benefits of the special expenditure. * * *

"When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its cost shall be raised. It may apportion the burden ratably among all the counties, or other particular sub-divisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.

"It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal and oppressive State legislation. The judicial power of the Fed-

eral government can only be invoked when some right under the Constitution, laws or treaties of the United States is invaded. In all other cases, the only remedy for the evils complained of rests with the people, and must be obtained through a change of their representatives. They must select agents who will correct the injurious legislation, so far as that is practicable, and be more mindful than their predecessors of the public interests." (Pages 703, 704).

"It is not necessary to constitute an agency of a political sub-division of a State that its officials should be elected by its people or be appointed with their assent. It is enough to give them that character that, however appointed, they are authorized by law to act for the county, district, or other political sub-division." (Page 706).

But if this court should find that the validity of the portion of the act now under consideration—the authority of the drainage board to assess townships, is properly before it and should disagree with the trial court and hold that it is invalid, this would affect only that portion of the act and would not affect the remainder of it.

PLAINTIFFS' BRIEF AND THIRD CONTENTION.

The third contention of plaintiffs in error in the State Supreme Court, as set out in the court's opinion, contains in fact the only claim that the act in question violates the 14th Amendment. The entire "claim," if such it can be called, is contained in the following language, quoted from the opinion (Abst., p. 12):

"It is next contended that the act in question violates the 14th Amendment to the Constitution of the United States and Section 13 of the State Constitution prohibiting the taking of property without due process of law. This contention is based principally upon the first contention. Counsel say in their brief: 'In dealing with the objection we make we are not at all concerned with how the power is exercised by those who assert the power, but with the right to exercise it at all. * * * If the drainage board could be given any legislative powers of a discretionary nature, then there could be no question that the procedure prescribing the manner of exercising it as found in this Act would fully comply with the requirements of due process.' What we have already said upon appellants' first contention is therefore a sufficient answer to this last contention."

It is clear that plaintiffs' contention in the State Supreme Court was that the act was invalid because it delegated power to make assessments to an appointive board. In this court plaintiffs do not stand upon that contention alone, but urge in their brief a number of criticisms of the act, and one additional and chief contention which we will consider, and

that is that the act is void because, as they claim, it authorizes the board to decide upon the expediency of the construction of the drain. It has not been practicable for us, because of the conditions of the record, to closely follow plaintiffs' brief. Our views upon the substantial questions which are involved have already been stated. We will, however, as briefly as may be, refer to some of the errors of fact and law into which we believe counsel for plaintiffs has fallen in their brief.

At pages 21, 22, 25 and 26, we find counsel makes the following statements of fact as the basis for his arguments:

"The particular features of the statute as thus construed, to which we wish to call special attention, are these: While the act provides for notice and hearing on the question of the apportionment of the cost among those benefited, *it requires no hearing or notice by the board on the question as to the propriety of a drain and permits that question to be decided before a hearing is had. The act gives the board uncontrolled power to decide without notice or hearing whether the conditions do or do not warrant the creation of a taxing district for the construction of the proposed drain and, without defining what those conditions shall be, makes the judgment of the board final and conclusive on that question.* It is upon those features of the act indicated by the above italicised portions that plaintiffs in error base their contention that the act is a denial of due process." (Pages 21, 22).

* * "As heretofore pointed out, supra, pp. 20, 21, the act in its present form since the amendment of 1903, empowers the board to decide finally and conclusively whether or not a drain shall be established. That question is conclusively determined *ex parte* by the board without any hearing or notice. Moreover the legislature has not in the act defined what conditions shall exist to warrant or require the construction of a drain, and has not prescribed any criteria by which to determine whether or not the construction of a drain is justified or necessary." (Page 25).

Counsel err in their assumptions. The only *ex parte* conclusion, and that is necessarily a tentative one, is that made by the board from a personal examination of the route of the drain after receiving the petition that in its opinion the proposed drain is necessary "for the public good." It acts upon this preliminary question in a tentative way before going to the expense of having a surveyor. (See Section 1821.) Two hearings upon notice are given by the act; one upon the petition on ten days' notice (Section 1821). The petition is not acted upon until after this hearing is had (Section 1822). A further notice is given to all persons interested and a full hearing is had after the percentage assess-

ment has been made. At this hearing each person or corporation interested may interpose any objections touching the imposition of an assessment. The State Supreme Court has not given this section a construction which would render the hearing inadequate or insufficient and this court certainly will not do so for the purpose of rendering the act void (Sections 1828, 1829.)

The act lays down an absolute rule governing the action of the drainage board as to the granting or refusal of the petition. It provides that if the cost exceeds the benefit it shall be denied. If the benefits exceed the cost it shall be granted. (See Section 1822). It also gives a rule for fixing the boundaries of the district by providing that property benefited shall be included and that which is not benefited shall be excluded (Section 1826).

Now we may ask what has been and is the plaintiffs' position in reference to the validity of this act, the enforcement of which they are seeking to enjoin? In the trial court (Abst., p. 4) they contended merely "that power to tax is a legislative power and cannot be delegated to boards or commissions whose appointments have not been in some way assented to by the people." In the Supreme Court they urged, this as their first and chief contention (Abst., p. 7), and incidentally it was there argued that for the same reason it violated the 14th Amendment to the Federal Constitution (Abst., p. 12). In this court an additional reason is urged, and this, as we understand their brief, constitutes their chief reason for asking this court to set this act aside. Their present claim is that the act is void because they claim it vests uncontrolled authority in the board to decide upon the propriety and expediency of the construction of the drain. This contention appears in part in the language we have already quoted. The following additional quotation from the brief, together with what we have already quoted, will fully cover, we think, their contention:

"We concede that it was entirely permissible to create and empower this drainage board to apportion and equalize the assessments among those benefited and to make the decisions of the board on these matters final and not reviewable. We also concede that the notice and hearing provided for this purpose would be sufficient were it not for the other features of the law to which we object. The objectionable feature of the law is that it purports to vest in the board of drain commissioners unlimited discretionary power of a purely legislative nature other than administrative or judicial, in flagrant violation of the principles above set forth. (Page 25) * * * The establishment of a drain involves, in addition to the foregoing acts, the determination of the *expediency* of the undertaking, the inquiry as to whether or not the drain

is sufficiently conducive to the health, welfare or convenience of the people affected to require or warrant it. This is purely a question for the decision of a legislative body, and under our form of government is required and permitted to be exercised only by an appropriate body, representative, and answerable to the community in which it exercises its jurisdiction." (Page 27).

It is apparent that counsel is in error both as to fact and law. As we have seen, the legislature has laid down an absolute rule for the guidance of the board in granting or denying a petition and establishing a drain, for fixing the boundaries of the drain, and the amounts of the assessment. It is wholly incorrect to say that the board has uncontrolled discretion, or that they exercise any legislative power whatever. The act is complete in every particular. It leaves nothing to the drainage board or others who act under it save acts of an administrative character. The board determines the fact as to what property will be benefited and thus marks the boundaries of the district. It determines whether the cost of the drain will exceed the benefits and upon the facts thus ascertained the law operates, declaring in one event that the drain shall be constructed and in another that the petition shall be rejected. Every step taken is under and in pursuance of legislative direction. All of the acts performed are administrative acts under the law and in execution of it. The matter of expediency of the drain is not left to the discretion of the drainage board. The legislature itself determined that question in advance. The board merely finds the facts and the law operates on them and declares the result. If it is found that the proposed drain will be for the public good and that the benefits will exceed the cost, the legislature says it is expedient and directs the board to proceed with the undertaking. If these facts are not found, the legislature declares the improvement is not expedient and the board, under its direction, denies the petition. The legislature cannot delegate its law-making power. But clearly no law-making power is delegated or parted with in this act. A considerable part of the power of a state is in its legislative body. It has exclusive power to make laws and, as stated, cannot delegate this law-making power, but outside of its law-making power this prohibition does not apply. These powers which are not strictly law-making powers, it may exercise itself or refer them to such bodies or persons as it may select. The usual course is to delegate them to other bodies. Indeed, it would not be possible for the legislative body of a state to exercise personally all of the additional powers which it possesses. It is sufficient if the legislature lays down the rule in advance upon which they are to act. The determination of the facts upon which the law is to operate may properly, and in fact is usually, left for enforcement decision in each

manner as the legislature may see fit. This question is not a new one.

The question of the right of the legislature to delegate power to determine facts upon which the law makes or intends to make its operation depend was before this court in Field v. Clark, 143 U. S. 649, in which the tariff act of 1890, known as the McKinley act, was held valid as against the objection that it conferred legislative power upon the president by authorizing him to suspend those provisions of the act relating to the free introduction of certain foreign products. This court sustained the act against this objection, stating that "nothing involving the expediency or the just operation of such legislation was left to the determination of the President. * * * Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect."

This court in its opinion quoted with apparent approval the following:

" 'The true distinction,' as Judge Ranney speaking for the Supreme Court of Ohio has well said, 'is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' Cincinnati, Wilmington, etc., Railroad v. Commissioners, 1 Ohio St. 88. In Moers v. City of Reading, 21 Penn. St. 188, 202, the language of the Court was: 'Half the statutes on our books are in the alternative, depending on the discretion of some person or persons to whom is confided the duty of determining whether the proper occasion exists for executing them. But it cannot be said that the exercise of such discretion is the making of the law.' So, in Locke's Appeal, 72 Penn. St. 491, 498: 'To assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.' The proper distinction the court said was this: 'The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-

making power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' " (pp. 693, 694.)

The views of other courts correspond with those quoted. We cite the following:

The Supreme Court of Ohio, in C., W. & Z. Ry. Co. v. Commissioners, 1 Ohio St. 77, in overruling an objection that an act of the Ohio Legislature which depended for its effect upon a vote of the people in Clinton county involved a delegation of legislative power, said: "The whole body of our legislation, as well as that of every other state, is divided between laws which imperatively command or prohibit the performance of acts, and those which only authorize or permit them;" and, after referring to several classes of permissive laws, the enforcement of which rested in official discretion, said: "But because such discretion is given, are these and all similar enactments to be deemed imperfect and nugatory? It would take a bold man to affirm it. In what does this discretion consist? Certainly not in fixing the terms and conditions upon which the act may be performed, or the obligations thereupon attaching. These are all irrevocably prescribed by the legislature, and, whenever called into operation, conclusively govern every step taken. The law is therefore perfect, final and decisive in all its parts, and the discretion given only relates to its execution. It may be employed or not employed; if employed, it rules throughout. If not employed, it still remains the law, ready to be applied whenever the preliminary condition is performed. The true distinction, therefore, is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done. To the latter no valid objection can be made." And also the following, from the very able opinion of Judge Marshall in Slack v. M. & L. R. R. Co., 13 B. Mon. 1: "It is not essential to the character and force of a law that the legislative enactment should itself command to be done everything for which it provides. The legislative power to command a particular thing to be done includes the power to authorize it to be done. The act done under authority conferred by the Legislature is precisely as legal and valid as if done in obedience to a legislative command * * * So far as such a statute confers authority and discretion, it is as obligatory from the first as the legislative power can make it; and, although its further practical efficiency may depend upon the discretionary act of some other body or individual, it is not derived from that discretion, but from the will of the Legis-

lature which authorized the act and prescribed its consequences."

Again it was said in San Antonio v. Jones, 28 Tex. 19: "The Legislature may grant authority as well as give commands, and acts done under its authority are as valid as if done in obedience to its commands. Nor is a statute whose complete execution and application to the subject matter by its provisions made to depend on the assent of some other body a delegation of legislative power. The discretion goes to the exercise of the power conferred by the law, but not to make the law itself. The law in such cases may depend for its practical efficiency on the act of some other body or individual; still it is not derived from such act, but from the legislative authority. Legislation of this character is of familiar use, and occurs whenever rights or privileges are conferred upon individuals or bodies which may be exercised, or not, in their discretion."

See, Johnson v. Martin, 75 Tex. 33, 12 S. W. 321.
State v. Wilcox, 45 Mo. 458.
Also Picton v. County of Cass et al., 13 N. D. 242, 100 N. W. 711.

Also the following cases:

State v. Stewart, (Wis.) 43 N. W. 947.
Huston v. Clark, 112 Ill. 344.
Owners of Lands v. People, 113 Ill. 296, 307.
Village of Hyde Park v. Spencer, (Ill.) 8 N. E. 846.
State v. Stewart, 74 Wis. 620, 6 L. R. A. (N. S.) 394.
National Docks R. R. Co. v. Central R. R., 32 N. J. Eq. 755, 763.
Bryant v. Robbins, (Wis.) 35 N. W. 545.
State v. Board of Com'rs, (Minn.) 92 N. W. 216.

We respectfully submit that this case should be dismissed for want of jurisdiction, or affirmed upon the merits.

Respectfully submitted,
J. S. Watson,
Attorney for Defendants in Error.

Ball, Watson Young & Lawrence,
Of Counsel.

SOLIAH *v.* HESKIN ET AL., DRAIN COMMISSIONERS OF TRAILL COUNTY, NORTH DAKOTA.

ERROR TO THE DISTRICT COURT OF TRAILL COUNTY, STATE OF NORTH DAKOTA.

No. 76. Argued December 5, 1911.—Decided January 9, 1912.

The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people.

The Fourteenth Amendment does not invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as in this case, notice is given and an opportunity to be heard afforded the landowner before the assessment becomes a lien against his property.

The Fourteenth Amendment does not deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain.

THE facts are stated in the opinion.

Mr. Edward Engerud, with whom *Mr. P. G. Swenson* was on the brief, for plaintiffs in error.

The court declined to hear further argument, but *Mr. J. S. Watson* filed a brief for defendants in error.

Memorandum opinion by direction of the court. MR. JUSTICE LAMAR.

Under the North Dakota statute (ch. 23, Political Code; Rev. Codes 1905) the County Commissioners are authorized to appoint a Drainage Board in each county. On the petition of six persons, owning land to be affected, or of a sufficient number to show a public demand where the drain is intended to benefit a township, the board makes a preliminary examination. If it finds that the drain is for the public good and will cost less than the benefits, "notice containing a copy of the petition is published and an opportunity to be heard upon the matters pertaining thereto afforded the owners of all lands to be affected." "If it shall appear that there was sufficient cause for the making of such petition, and that the proposed drain will not cost more than the amount of the benefit," the board shall establish the drain. Their assessment of benefits is subject to review, but, when confirmed, is final, and is then extended on the tax list and collected as other taxes—the amount assessed to any township is required to be included in its first general tax levy thereafter.

The plaintiffs in error, owning land in Mayville and Morgan Townships, North Dakota, brought proceedings to enjoin a Drainage Board appointed by County Commissioners from making and collecting special assessments against plaintiffs in error and the townships for their proportion of the cost of a drain ordered to be constructed.

The Supreme Court of the State held that, while taxes could only be levied by elected officers, special assessments

for benefits conferred by such drains might be imposed by appointed officers, and that the statute afforded due process of law. So far as the Federal questions are concerned, the judgment must be affirmed. For—

1. The Fourteenth Amendment does not deprive a State of the power to determine what duties may be performed by local officers, nor whether they shall be appointed, or elected by the people. *Dreyer* v. *Illinois*, 187 U. S. 71; 83; *Prentis* v. *Atlantic Coast Line R. R.*, 211 U. S. 210; *County of Mobile* v. *Kimball*, 102 U. S. 691, 706; *Fallbrook District* v. *Bradley*, 164 U. S. 112, 167.

2. Neither does that Amendment invalidate an act authorizing an appointed board to determine whether a proposed drain will be of public benefit, and to create a drainage district consisting of land which it decides will be benefited by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property. *Ibid.*

3. Nor does that Amendment deprive a State of the power to compel a township, as one of its political subdivisions, to levy and collect taxes for the purpose of paying the amount assessed against such township for the public benefits accruing from the construction of the drain. *Ibid; Bauman* v. *Ross*, 167 U. S. 548, 589–593; *County of Mobile* v. *Kimball*, 102 U. S. 691, 703–704.

Affirmed.